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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d, authorizes a federally-insured state-chartered bank to charge on its intrastate and interstate loans the "interest" allowed by the laws of its home State, and expressly preempts any contrary state laws. The question presented is:

Whether the meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act is narrowly confined to percentage-based periodic rates, as held by the New Jersey Supreme Court in this case, or also encompasses a flat late charge that a borrower has agreed to pay in the event of delinquency, as held by the Court of Appeals for the First Circuit and the Supreme Courts of California and Colorado?

PARTIES TO THE PROCEEDINGS

The names of the parties in the New Jersey Supreme Court appear in the caption of the case on this Petition and the New Jersey Supreme Court's opinion, which is reproduced in the appendix to this Petition. Petitioner Greenwood Trust Company has no subsidiaries. Greenwood Trust Company's corporate parent is NOVUS Credit Services Inc., which in turn is owned by Dean Witter, Discover & Co.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Greenwood Trust Company (hereinafter "Greenwood") respectfully petitions that a writ of certiorari issue to review the opinion of the New Jersey Supreme Court rendered in this action on November 28, 1995.

OPINIONS BELOW

The majority and dissenting opinions of the New Jersey Supreme Court in this case are reported at 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995). They are reprinted in the appendix to this Petition at 1a-17a. The majority and dissenting opinions of the New Jersey Supreme Court in the companion case of *Sherman v. Citibank (South Dakota), N.A.*, 1995 N.J. LEXIS

1355 (N.J. Nov. 28, 1995), which are referred to extensively in the Court's opinions in this case, are reprinted in the appendix at 18a-73a. The opinion of the New Jersey Superior Court, Appellate Division, is published at 272 N.J. Super. 526, 640 A.2d 855 (1994), and is reprinted in the appendix at 74a-86a. The order of the New Jersey Superior Court, Law Division, is unpublished and is reprinted in the appendix at 87a.

JURISDICTION

The New Jersey Supreme Court entered its judgment on November 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), provides in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions . . . such [a] State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located. . . .

Section 85 of the National Bank Act, 12 U.S.C. §85, provides in pertinent part:

> Any [national banking] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located. . . .

Del. Code Ann., Tit. 5, §950, provides in pertinent part:

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default. . . .

N.J.S.A. §17:16C-50 provided, during the time period relevant to this case, as follows:

> No retail seller, sales finance company, or holder shall charge, contract for, collect or receive from any retail buyer, directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with retail installment contracts or retail charge accounts other than the charges permitted by this act. . . .

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review an unprecedented decision by the New Jersey Supreme Court in which a 4-3 majority held that the meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d, "is limited to a periodic charge expressed as a percentage of a principal balance due" (App. 32a), and does not encompass a flat late charge imposed by Greenwood on holders of its credit card, the Discover® Card, who fail to make timely payment of their minimum monthly balances. By holding that the preemptive scope of Section 27

is narrowly confined to percentage-based periodic rates, the New Jersey Supreme Court concluded that federally-insured state banks such as Greenwood must conform to the conflicting late charge prohibitions and restrictions of all 50 states where their borrowers reside. In a companion case involving credit card late charges assessed by a national bank, the same 4-3 majority held that "interest" in Section 85 of the National Bank Act ("NBA"), 12 U.S.C. §85, which served as the model for Section 27 of the FDIA and contains virtually identical language, likewise does not encompass flat late charges. *Sherman v. Citibank (South Dakota), N.A.*, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995) (App. 18a-73a).

The New Jersey Supreme Court majority acknowledged that its holding in this case and *Sherman v. Citibank* is directly contrary to recent decisions by the United States Court of Appeals for the First Circuit, the California Supreme Court, and the Colorado Supreme Court. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (filed Nov. 30, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995). Those three courts have all squarely held that flat late charges assessed on credit card accounts by federally-insured banks *are* "interest" under Section 27 of the FDIA and its progenitor, Section 85 of the NBA. Unlike the New Jersey Supreme Court, those three courts have concluded that Section 27 of the FDIA and Section 85 of the NBA permit federally-insured state banks and national banks, respectively, to assess throughout the country the flat late charges allowed by the laws of the bank's home State, and preempt any contrary laws in the borrower's State. The identical conclusion has been reached by five different federal banking agencies.

The New Jersey Supreme Court's radical departure from judicial and administrative agency precedents already has engendered tremendous turmoil and uncertainty in the nation's banking industry, and has called into question the

legality of billions of dollars of fees and charges imposed by federally-insured depository institutions throughout the country over a span of many years.

A. Factual Background

The facts relevant to this Petition are straightforward and undisputed. Greenwood is a federally-insured state-chartered bank located in Delaware. As part of its banking services, Greenwood issues a credit card, the Discover® Card, pursuant to which it lends money on an open-end credit basis to borrowers in all 50 states.

This case concerns a $10 late charge imposed by Greenwood on cardmembers who failed to make payment of their required minimum monthly balance (1/36th of the total balance) within twenty days after the due date. The late charge is clearly and conspicuously disclosed in the Discover Cardmember Agreement.

Greenwood imposes its late charge on an interstate basis in reliance upon Section 27 of the FDIA, 12 U.S.C. §1831d(a), which authorizes a federally-insured state bank to charge "interest" on its loans at "the rate allowed by the laws of the State ... where the bank is located," and expressly provides that any contrary law in the borrower's State "is hereby preempted." Greenwood is located in Delaware, whose laws authorize the imposition of any late charge agreed to between a borrower and a lender. Del. Code Ann., Title 5, §950.

B. Procedural History

Respondent James Hunter filed this putative class action in March, 1992 on behalf of himself and all other New Jersey residents who had been issued a Discover Card by Greenwood and were assessed a late charge. He alleged that the late charge violated the New Jersey Retail Installment Sales Act, N.J.S.A. §17:16C-50, which prohibited late charges. He requested compensatory damages, treble damages under the New Jersey Consumer Fraud Act, punitive damages, and attorneys' fees on behalf of the proposed class.

This case is one of numerous class actions filed around the country against Greenwood and the nation's other leading credit card issuers in the immediate wake of a decision against Greenwood by a District Court in Massachusetts holding that late charges are not "interest" under Section 27 of the FDIA and that Massachusetts' statutory prohibition of late charges was not preempted. *Greenwood Trust Co. v. Massachusetts,* 776 F.Supp. 21 (D. Mass. 1991). However, after this case and the many others like it were commenced, the Court of Appeals for the First Circuit unanimously reversed the District Court's decision, and this Court denied the Petition for Certiorari filed by the Commonwealth of Massachusetts. *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818 (1st Cir. 1992), *cert. denied,* 113 S. Ct. 974 (1993).

On February 5, 1993, the trial court in this case granted Greenwood's Motion to Dismiss the Complaint on the ground that plaintiff's claims under New Jersey law were preempted by Section 27 of the FDIA. (App. 87a). On April 22, 1994, the Superior Court of New Jersey, Appellate Division, unanimously affirmed the dismissal of plaintiff's Complaint, holding that Greenwood's late charge is "interest" that is encompassed within the preemptive scope of the federal statute. (App. 74a-86a).

On November 28, 1995, the New Jersey Supreme Court, in a 4-3 decision, held that the meaning of "interest" in Section 27 "is limited to a periodic charge expressed as a percentage of a principal balance due" (App. 32a), and therefore does not embrace the flat late charge imposed by Greenwood. On that same day, the Court handed down a similar 4-3 decision in a companion case involving Citibank (South Dakota), N.A., a national bank, in which it held that flat late charges are not "interest" under Section 85 of the NBA. *Sherman v. Citibank (South Dakota), N.A.,* App. 18a-73a. In both of its decisions, the New Jersey Supreme Court recognized, as have all other courts and the Federal Deposit Insurance Corporation ("FDIC"), that Section 27 of the FDIA should be interpreted *in pari materia* with Section 85 of the NBA, since Section 27 was modeled by Congress after Section 85, contains virtually identical language, and was enacted by Congress in 1980 in

order to confer upon federally-insured state banks the same federal lending authority enjoyed by national banks. (App. 4a-5a; 24a-25a).

In its majority opinions in these cases, the New Jersey Supreme Court acknowledged that its holding that flat late charges are not "interest" under Section 27 of the FDIA and Section 85 of the NBA is squarely contrary to decisions involving precisely the same issue rendered by the Court of Appeals for the First Circuit, the California Supreme Court, and the Colorado Supreme Court. (App. 28a, 32a). The New Jersey Supreme Court instead repeatedly cited and relied upon the *reversed* District Court decision in *Greenwood Trust v. Massachusetts* and the *dissenting* opinions in the California Supreme Court case. (App. 5a, 21a-24a, 27a, 32a). The New Jersey Supreme Court also recognized that its holding is in direct conflict with the statutory interpretations rendered by the FDIC, which enforces the Federal Deposit Insurance Act and regulates federally-insured state banks such as Greenwood, and the Office of the Comptroller of the Currency ("OCC"), which enforces the National Bank Act and regulates national banks.

Aside from its repeated reliance upon the reversed District Court decision in *Greenwood Trust v. Massachusetts* and the dissenting opinions in the California Supreme Court case, the New Jersey Supreme Court majority did not even purport to cite any judicial precedents or other authority for its holding that "interest" in Section 27 of the FDIA and Section 85 of the NBA is limited to percentage-based periodic rates. Instead, it relied upon: (a) the legislative history of an entirely *different* statute, 12 U.S.C. §1735f-7a(a)(1), which is part of the National Housing Act; (b) proposed legislation introduced in Congress in the early 1980's that was *not* enacted into law; and (c) New Jersey statutes that differentiate between "interest" and other charges, such as late charges, for purposes of *New Jersey* law. (App. 6a, 25a-27a, 35a-41a).

In a lengthy dissenting opinion, Justice Pollock emphasized that the majority's decision was directly contrary to decisions reached by the other courts that have considered the same issue and also contrary to statutory interpretations by

the federal banking agencies. After reviewing dictionary definitions of "interest," he concluded that "accepted usage recognizes that 'interest' may include charges other than periodic interest." (App. 50a). Justice Pollock's dissenting opinion cites numerous non-credit card cases demonstrating that "federal common law support[s] a broad definition of interest that includes late fees." (App. 54a).

Moreover, Justice Pollock noted that the majority's decision conflicts with the "most favored lender" doctrine enunciated by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), and reiterated a century later in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 314 and n. 26 (1978). That doctrine provides that, to ensure competitive equality, federally-insured depository institutions are empowered to charge whatever "interest" the "most favored lender" in the same State is permitted to charge. As Justice Pollock pointed out, the effect of the majority's opinion is to allow New Jersey credit unions to impose late charges on their delinquent credit cardholders, but to deny that same right to national banks and federally-insured state banks located in New Jersey. This is precisely the type of discrimination against federally-insured depository institutions that the "most favored lender" doctrine was intended to prevent.

REASONS FOR GRANTING THE PETITION

Supreme Court review is needed to resolve direct conflicts between the New Jersey Supreme Court's 4-3 decision and decisions of this Court, the Supreme Courts of other States, and the Court of Appeals for the First Circuit on a federal banking law issue whose resolution is of enormous importance to federally-insured depository institutions throughout the country.

The holding of the New Jersey Supreme Court that the meaning of the term "interest" in Section 27 of the FDIA is limited to percentage-based periodic rates, and does not encompass flat late charges, is in direct conflict with decisions by the First Circuit and the Supreme Courts of California and

Colorado. The New Jersey Supreme Court's decision also conflicts with the opinions of the federal banking agencies, all of whom have concluded that flat late charges are embraced within the preemptive scope of the federal banking statutes. Moreover, the New Jersey Supreme Court's decision conflicts with a long line of federal appellate court cases uniformly holding a variety of flat fees and charges to be "interest" under Section 85 of the NBA.

The New Jersey Supreme Court's conclusion that New Jersey credit unions could impose unlimited late charges on delinquent credit cardholders, but neither national banks nor federally-insured state banks located in New Jersey could assess any late charges, squarely conflicts with the "most favored lender" doctrine set forth in this Court's decision in *Tiffany.*

The New Jersey Supreme Court's decision conflicts in principle with this Court's decision in *Marquette,* which held that Section 85 of the NBA authorizes the interstate exportation of the "interest" allowed by the bank's home State and preempts the usury laws in the borrower's State. The New Jersey opinion also conflicts in principle with the many decisions by this Court according deference to the statutory interpretations rendered by the federal banking agencies, as exemplified by the Court's recent unanimous opinion in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.,* 115 S. Ct. 810 (1995).

Certiorari is warranted not only because of the foregoing conflicts, but also because of the profound national importance of the legal issues presented. This Court has never construed the term "interest" in Section 27 of the FDIA or the three other similarly-worded banking statutes (12 U.S.C. §85, 12 U.S.C. §1463(g), and 12 U.S.C. §1785(g)), and the proper interpretation of these statutes is of critical importance since they govern all types of intrastate and interstate lending by national banks and federally-insured state banks, savings associations, and credit unions.

The New Jersey Supreme Court's opinion may affect the interstate exportation not just of late charges, but also other flat fees customarily imposed by credit card issuers and other

lenders, such as origination fees, annual fees, cash advance fees, and non-sufficient funds fees. The decision below, if followed in other jurisdictions, will have nationwide significance since numerous states' laws prohibit or limit late charges and other of the foregoing fees. Moreover, with over $3 billion in fee revenue (*i.e.*, revenue not derived from periodic finance charges) collected each year by credit card issuers, the economic ramifications of the New Jersey decision for the credit card industry are enormous in terms of both past and future conduct. Also, the decision may have a major impact on other types of interstate and intrastate lending as well. Given the tremendous disruption and uncertainty for lenders and borrowers created by the direct conflicts between the New Jersey decision and so many other authorities, it is vital that guidance be provided by this Court.

A. The New Jersey Supreme Court's Unduly Narrow Definition of "Interest" in the Federal Banking Statutes Conflicts With Decisions By Other State Supreme Courts, Federal Appellate Courts, and Federal Banking Agencies

1. The New Jersey Supreme Court decision holding that flat late charges are not "interest" under Section 27 of the FDIA and Section 85 of the NBA creates a sharp and direct conflict with the decisions rendered by the First Circuit in *Greenwood Trust v. Massachusetts,* the California Supreme Court in *Smiley v. Citibank,* and the Colorado Supreme Court in *Copeland v. MBNA.* Moreover, other cases involving the issue of whether credit card late charges are "interest" under the federal banking statutes are pending in other jurisdictions and also have reached conflicting conclusions.[1]

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1. Lower courts that have held that credit card late charges are "interest" under the federal banking laws include *Tikkanen v. Citibank, N.A.*, 801 F.Supp. 270 (D. Minn. 1992); *Ament v. PNC Nat'l Bank,* 849 F.Supp. 1015 (W.D. Pa. 1994) (appeal pending); and *Stoorman v. Greenwood Trust Co.*, 888 P.2d 289 (Colo. App. 1994), *cert. granted* (Colo. Jan. 30, 1995). The *Ament* case is pending in the Court of Appeals for the Third Circuit, having been argued in February, 1995. The only court besides the New Jersey Supreme Court to conclude that credit card late charges are not "interest" under federal law is the intermediate appellate court in Pennsylvania, and

When this Court denied certiorari in *Greenwood Trust v. Massachusetts* in January, 1993 (113 S. Ct. 974), the issue was still one of first impression in the appellate courts and no conflicts had yet arisen. However, the cases spawned by the reversed District Court decision in *Greenwood Trust v. Massachusetts* have now proceeded through various state Supreme Courts, and a stark conflict has arisen that can be resolved only by this Court. The New Jersey decision, like the District Court decision in *Greenwood Trust v. Massachusetts,* undoubtedly will give rise to many more class action lawsuits around the country against federally-insured depository institutions, and these cases will impose substantial burdens and expenses upon the parties and the courts. Unless certiorari is granted now, the conflicting interpretations of the federal banking statutes surely will persist and multiply. These conflicting rulings already have created considerable turmoil and uncertainty for the nation's banking industry and exposed it to potentially enormous damage claims. The longer the conflicts are allowed to continue, the greater the harm that will be inflicted upon the countless lenders and borrowers who participate in the country's multi-billion dollar interstate lending market.

2. The opinion by the New Jersey Supreme Court squarely conflicts not only with the decisions of the First Circuit and Supreme Courts of California and Colorado, but also with the statutory interpretations of five different federal banking agencies.

The FDIC has specifically concluded that flat credit card late charges imposed by federally-insured state banks are "interest" under Section 27 of the FDIA. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH)

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that court's decision has been granted review by the Pennsylvania Supreme Court. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) *(en banc), allocatur granted,* 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation,* 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted,* 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA),* 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending). In addition to the foregoing cases, there are many other cases pending around the country against credit card issuers in which published decisions have not been rendered.

¶81,534 (July 8, 1992). Also, the FDIC filed briefs as *amicus curiae* in the First Circuit and Supreme Courts of New Jersey and Colorado asserting that Greenwood's late charge should be considered "interest" under Section 27. The New Jersey Supreme Court majority did not even mention this Court's recent unanimous opinion in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995), which accorded deference to the OCC's interpretation of the NBA, and it improperly refused to defer to the FDIC's views.[2]

The OCC has opined on several occasions that credit card late charges are "interest" under Section 85 of the NBA. OCC Interpretive Ltr. No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,618 (Feb. 17, 1995); Letter from William P. Bowden, Jr., OCC Chief Counsel, 1992 WL 136390 (OCC) (Feb. 4, 1992); OCC Interpretive Ltr. No. 452, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988). *See also* 60 Fed. Reg. 11924, 11940 (March 3, 1995) (proposed OCC Interpretive Ruling stating that late charges are "interest" under Section 85).

Section 4(g) of the Home Owners' Loan Act, 12 U.S.C. §1463(g), which applies to federally-insured savings institutions, and Section 205(g) of the Federal Credit Union Act, 12 U.S.C. §1785(g), which applies to federally-insured credit unions, were enacted at the same time as Section 27 of the FDIA and contain virtually the same language as Section 27 and Section 85 of the NBA. The Office of Thrift Supervision, which regulates federally-insured savings institutions, has opined that credit card late charges are "interest" under 12 U.S.C. §1463(g). Letter of Karen Solomon, OTS Deputy Chief

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2. The majority denied deference on the ground that the FDIC's interpretations of Section 27 supposedly are "inconsistent." (App. 7a). However, it did not cite any FDIC opinions demonstrating an inconsistent position on the question of what constitutes "interest" under Section 27, and indeed the FDIC has *never* taken any inconsistent positions on this issue. This Court has accorded deference to the FDIC's interpretations of the FDIA where, as here, they are well-reasoned and comport with the language of the statute and Congressional intent. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986).

Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 (Sept. 29, 1994). The predecessor of the OTS, the Federal Home Loan Bank Board, reached the same conclusion in 1986. Letter of Harry W. Quillian, FHLBB Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 at p. 62,403 (June 27, 1986). The National Credit Union Administration, which regulates credit unions, opined that credit card late charges are "interest" under 12 U.S.C. §1785(g). Letter of Richard S. Schulman, Acting Assoc. Gen. Counsel, NCUA, 62 Banking Rep. (BNA) 766 (April 11, 1994).

Federally-insured depository institutions justifiably look to the opinions and interpretations of the federal banking statutes by the federal banking agencies that govern them. Billions of dollars in loan transactions are conducted annually in reliance upon those banking agency interpretations, and therefore it is particularly important that deference be accorded to them. *See, e.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 457-58 (1978) ("In light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.' "). Also, substantial deference is owed since the same statutory interpretation has been reached by five different agencies. *Clarkson Const. Co. v. OSHA,* 531 F.2d 451, 457 (10th Cir. 1976).

3. The New Jersey Supreme Court's holding that "interest" in Section 27 of the FDIA and Section 85 of the NBA is limited to percentage-based periodic rates conflicts with many decades of jurisprudence under Section 85 of the NBA. Indeed, the majority was unable to cite even a single final decision rendered in the 130 years since that statute was enacted in 1864 defining "interest" under Section 85 in such an artificially constricted fashion.

To the contrary, as pointed out by the First Circuit in *Greenwood Trust v. Massachusetts,* federal appellate courts applying Section 85 "have had little trouble in construing the term 'interest' to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate.... Fairly read, these opinions

expand the scope of section 85 preemption — and, by implication, the scope of section 521 [Section 27 of the FDIA] preemption — well beyond periodic percentage rates." 971 F. 2d at 829-830. *See, e.g., Fisher v. First National Bank,* 548 F.2d 255 (8th Cir. 1977) (flat $5 credit card cash advance fee); *Northway Lanes v. Hackley Union National Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972) (flat $1,595 closing costs); *Cades v. H&R Block, Inc.,* 43 F.3d 869 (4th Cir. 1994), *cert. denied,* 115 S. Ct. 2247 (1995) (flat $29 charge for tax refund anticipation loan); *Cronkleton v. Hall,* 66 F. 2d 384 (8th Cir.), *cert. denied,* 290 U.S. 685 (1933) (flat $1,000 commission).[3]

The New Jersey Supreme Court's holding that flat fees are not "interest" under Section 85 is also squarely at odds with established banking practices when the statute was first enacted in 1864. At that time, and for many decades thereafter, banks generally lent money and charged interest by discounting it in advance in a *flat* dollar amount. For example, a national bank might loan a borrower $900 in cash by having the customer sign a promissory note providing for the customer to pay the bank $1,000 one year later. *See McCarthy v. First National Bank of Rapid City,* 223 U.S. 493, 499 (1912) (noting that "Banks may make ordinary loans and charge interest to be collected at the maturity of the note. . .[T]hey usually reserve and deduct it in advance, by way of discount. . . ."). In fact, Section 85 expressly states that "interest may be taken in advance" and refers to the "amount of interest or *discount* to be charged." (emphasis added).

Nowhere in Section 27 of the FDIA or Section 85 of the NBA is the term "interest" modified by the word "percentage." The New Jersey Supreme Court's decision that a fee is "interest" only if it is charged on a percentage basis, and not if it is imposed in a flat amount, improperly exalts form over

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3. *Accord American Timber & Trading Co. v. First Nat'l Bank,* 690 F.2d 781, 787 (9th Cir. 1982); *McAdoo v. Union Nat'l Bank,* 535 F.2d 1050, 1056 (8th Cir. 1976); *Panos v. Smith,* 116 F.2d 445, 446 (6th Cir. 1940); *Schumacher v. Lawrence,* 108 F.2d 576, 577 (6th Cir. 1940); *In re Gerber's Estate,* 337 Pa. 108, 117-19, 9 A.2d 438 (1939); *Baker v. Lynchburg Nat'l Bank,* 120 Va. 208, 91 S.E. 157, 161 (Va. 1917); *First Nat'l Bank v. Phares,* 70 Okla. 255, 174 P. 519 (1918).

substance.[4] As emphasized by the Eighth Circuit in construing what is "interest" for purposes of Section 85, the real issue is "not semantics," but instead "[w]hat affects the borrower's pocketbook." *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 878 (8th Cir. 1975). There is simply no logical distinction between percentage-based and flat loan charges.

B. The New Jersey Supreme Court's Decision Conflicts With Decisions of this Court

1. The New Jersey Supreme Court held that even though New Jersey credit unions were not restricted in the amount of late charges they can impose on their delinquent credit cardholders, N.J.S.A. §17:13-104(b), federally-insured state banks and national banks located in New Jersey could not assess any late charges on their delinquent cardholders.[5] This ruling squarely conflicts with the "most favored lender" doctrine enunciated by this Court in *Tiffany* and reaffirmed in *Marquette*, 439 U.S. at 314 and n. 26. *See also* 12 C.F.R. §7.7310. In

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4. Adoption of the New Jersey Supreme Court's construction of the meaning of "interest" surely would invite semantic gamesmanship. A bank could express a flat $10 late charge as percentage-based "interest" for the first 20 days after default as follows:

> If you fail to make the minimum monthly payment within 20 days after the due date, you must pay an additional interest charge on the unpaid balance of the account covering the first 20 days of the delinquency. Each day during this period, the interest shall be computed by multiplying the unpaid balance by a percentage, the numerator of which equals 100 and the denominator of which equals twice the amount of the unpaid balance.

The percentage rate in this formula will vary with the amount of the unpaid balance but will always yield additional "interest" in the aggregate sum of $10. Alternatively, a bank simply could replace a fixed dollar late charge with one expressed in terms of a fixed percentage (*i.e.*, 6%) of the delinquent balance, or it could provide for a higher, post-default periodic interest rate.

5. The Court sought to justify this disparate treatment on the ground that credit unions are "small, individualized lenders" that "do not cater to a large market." (App. 8a). In fact, thousands of credit unions have credit card programs, some of which are very substantial in scope, and credit unions are posing an ever-increasing competitive threat to banks that issue credit cards. *See Credit Card News*, Dec. 15, 1993, "Credit Unions: The Card Industry's Quiet Dynamos;" *American Banker*, Oct. 10, 1995 at p. 9, "Watch Out, Bankers — Here Come the Credit Unions!"

Tiffany, the Court held that Section 85 of the NBA empowers a national bank to impose the interest charges available to the "most favored lender" under the laws of the bank's home State, and this doctrine safeguards national banks from "the hazard of unfriendly legislation by the states." 85 U.S. at 413. The OCC has specifically opined that under the "most favored lender" doctrine, a national bank may "borrow" the "interest" authority conferred upon credit unions located in the same State. OCC Interpretive Ltr. No. 336, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,506 (April 16, 1985). Also, as has been uniformly recognized by the courts and the FDIC, the 1980 enactment of Section 27 of the FDIA conferred "most favored lender" status on federally-insured state banks as well. (App. 4a-5a, 24a-25a); *Greenwood Trust v. Massachusetts,* 971 F.2d at 826-827; *Smiley v. Citibank,* 11 Cal. 4th at 159; *Vanderweyst v. First State Bank,* 425 N.W. 2d 803, 806 (Minn.), *cert. denied,* 488 U.S. 943 (1988); FDIC Opinion No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,635 (July 12, 1993).

As the California Supreme Court emphasized in *Smiley v. Citibank,* allowing certain favored lenders (such as credit unions) to impose late charges while denying that same right to federally-insured state banks and national banks located in the same State is precisely the type of "unfriendly legislation by the states" that this Court condemned in *Tiffany.*[6] 11 Cal. 4th at 154. This Court has mandated through the "most favored lender" doctrine that federally-insured depository institutions be placed in a position of competitive equality

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6. Justice O'Hern's dissenting opinion in *Sherman v. Citibank* explained the impermissible competitive advantage bestowed upon New Jersey credit unions by the majority's ruling:

> The favored lender, by contracting for flat, contingent charges from late payers, can protect itself against risks and costs associated with delinquencies while keeping monthly percentage charges low to attract good customers who are consistently punctual. The disfavored lender, who cannot collect late charges, tends to get all the customers who anticipate paying late and tends to lose the customers with strong credit and habits of punctuality because it must impose higher monthly percentage charges to make up for its inability to impose late charges. (App. 72a).

with all other lenders located in the same State, and the New Jersey Supreme Court's decision squarely conflicts with that doctrine.

2. The New Jersey Supreme Court's decision conflicts in principle with this Court's decision in *Marquette.* Notwithstanding the presence of an express and unambiguous preemption clause in Section 27 of the FDIA, the New Jersey Supreme Court declared that federal preemption did not apply. Quoting from the reversed District Court decision in *Greenwood Trust v. Massachusetts,* the majority stated that "state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain 'traditionally occupied' by the states." (App. 21a, quoting 776 F. Supp. at 27-28). However, in *Marquette,* Justice Brennan's opinion for a unanimous Court declared that "state usury laws must, of course, give way to the federal statute," and concluded as follows:

> Petitioners' final argument is that the 'exportation' of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates.... This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

439 U.S. at 318-319 and n.31.

Also, in *Marquette,* this Court stressed that if the meaning of the term "located" in Section 85 of the NBA "were to depend on the whereabouts of each credit-card transaction," this would "throw into confusion the complex system of modern interstate banking." *Id.* at 312. By the same token, if the legality of the late charge imposed by a national credit card issuer such as Greenwood were to depend on the residence of the cardholder or whereabouts of each credit-card transaction,

the complex system of modern interstate banking would become balkanized and thrown into confusion.[7]

3. The New Jersey Supreme Court's unduly narrow definition of "interest," confining it to percentage-based periodic rates, conflicts with numerous decisions by this Court that have established a far broader federal common law definition. In 1904, this Court held, in a unanimous opinion authored by Justice Holmes, that Section 85 governs as "interest" an overdraft charge characterized as a "penalty" paid by the borrower for "failure to pay a debt when due." *Citizens National Bank v. Donnell,* 195 U.S. 369, 373-74 (1904). *See also Brown v. Hiatts,* 82 U. S. (15 Wall.) 177, 185 (1872) ("Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention."); *United States v. North Carolina,* 136 U.S. 211, 216 (1890) ("Interest... is allowed by the courts as damages for the detention of money... or of compensation, to which the [lender] is entitled."); *Shoemaker v. United States,* 147 U.S. 282, 321 (1893) ("interest" includes "damages, by reason of the failure of the debtor to pay the principal when due"); *Library of Congress v. Shaw,* 478 U.S. 310, 315 n. 2 (1986) ("The institution of interest originated under Roman law as a penalty due from a debtor who delayed or defaulted in repayment of a loan.").

As the First Circuit correctly stated in *Greenwood Trust v. Massachusetts,* "[s]uggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic. Default necessarily increases the creditor's cost of processing a loan. Therefore, a late fee is sufficiently related to the 'use or forbearance of money, or ...

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7. As aptly pointed out by Justice Pollock in his dissenting opinion in *Sherman v. Citibank,* credit cardholders "use credit cards to charge meals, lodging, transportation, and other expenses when traveling throughout the nation and the world. Credit cardholders, moreover, can change their state of residence. Given the mobility of credit cardholders and transactions, federal regulation incorporating a bank's home-state's law is reasonable." (App. 63a).

damages for its detention' that it can appropriately be classified as interest'." 971 F.2d at 825.

C. The New Jersey Supreme Court's Decision Has Profound National Importance

Beyond the conflicts discussed above, there can be no doubt about the far-reaching legal and economic consequences of the federal question presented by this Petition. This Court has not yet rendered any opinion construing the meaning of the term "interest" in Section 27 of the FDIA or in the nearly identically-worded statutes applicable to national banks (12 U.S.C. §85), federally-insured savings associations (12 U.S.C. §1463(g)), and federally-insured credit unions (12 U.S.C. §1785(g)). Since the courts and federal banking agencies have held uniformly that "interest" carries the same meaning in all of these statutes, the New Jersey Supreme Court's decision will have significant ramifications for all federally-insured depository institutions.

Twenty-six states have laws that prohibit or restrict late charges,[8] and therefore the erroneous decision below, if permitted to stand, will interfere with the imposition of late charges by federally-insured depository institutions not just in New Jersey,[9] but throughout the country. Also, even though late charges are the only fees directly at issue in this case, the New Jersey Supreme Court's limitation of the meaning of "interest" in the federal banking laws to percentage-based periodic rates will affect numerous other flat fees and charges customarily imposed in connection with credit card loans (*e.g.*, annual fees, return check fees, cash advance fees, over-the-limit fees). Like late charges, these fees have long been exported throughout the country by credit card issuers from their home states notwithstanding myriad prohibitions or limitations on these fees in many borrowers' states because they

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8. DRI/McGraw Hill, *A Study of Employment, Regulations and the Credit Card Industry* at Table 3, pp. 16-18 (Feb. 1993).

9. As noted in the New Jersey Supreme Court opinions, although New Jersey recently abolished its prohibition of late charges, its laws now restrict late charges to no more than $10. Greenwood and many other credit card issuers currently assess late charges in excess of New Jersey's new $10 limit.

were considered to be "interest" that is encompassed within the preemptive scope of the federal banking statutes.[10] The national importance of this case is underscored by the fact that the Attorneys General of 17 States filed briefs as *amici curiae* in the New Jersey Supreme Court supporting the positions of the respective parties.[11]

The potential economic consequences of the New Jersey Supreme Court's rulings are staggering. According to the most recently available statistics, in 1994 alone the credit card industry received approximately $2.1 billion in revenues from late fees, overlimit fees, and other similar fees; $1.7 billion in annual fees; and $1.3 billion in cash advance fees. Credit Card Management, Card Industry Directory: *The Blue Book of the Credit and Debit Card Industry in the United States,* 1996 ed. at p. 18. The numerous class actions currently pending throughout the country against federally-insured depository institutions that were precipitated by the later-reversed District Court opinion in *Greenwood Trust v. Massachusetts* seek treble damages under various state consumer protection laws, which typically have statutes of limitation that permit suit for several years of transactions. These lawsuits, along with the new class actions that certainly will be inspired by the New Jersey Supreme Court decision, may pose a threat to the safety and soundness of the nation's leading financial institutions. Indeed, in an *amicus curiae* brief the FDIC filed in the First Circuit in the *Greenwood Trust v. Massachusetts* case, the

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10. According to *The New York Times,* "half the states in the country have laws limiting or banning credit card fees for late payments, for annual renewals and for exceeding credit limits." *New York Times,* February 23, 1992 at A1, "Suits Pushing Banks to Obey State Laws on Credit Card Fees." This article includes a chart listing the many states that prohibit late fees, limit late fees, prohibit fees for exceeding a line of credit, and limit annual fees. Although this chart does not reflect legislative changes in a few states since 1992, it nonetheless vividly demonstrates that the issue presented by this case has nationwide repercussions.

11. In the *Greenwood Trust v. Massachusetts* litigation, a total of 37 States and the District of Columbia participated as *amici curiae* in the First Circuit and in connection with Massachusetts' petition for certiorari in this Court.

agency cautioned that the credit card late charge class actions could "jeopardize the financial integrity of all FDIC-insured institutions."

Also, it bears emphasis that the New Jersey Supreme Court's construction of the meaning of "interest" in the federal banking statutes affects not only credit card lending, but all types of lending. For example, under the New Jersey Supreme Court's reasoning, a flat origination fee for a loan might no longer be considered "interest" as a matter of federal law. Also, many states allow flat minimum finance charges on open-end credit, and even though such finance charges clearly constitute "interest," they may not qualify as "interest" under federal banking law if the New Jersey decision is followed. Similarly, flat late charges imposed in connection with home equity loans, automobile loans, and commercial loans would not be "interest" either.

The New Jersey Supreme Court's evisceration of the "most favored lender" doctrine will also have a dramatic effect on intrastate lending. Federally-insured depository institutions have long relied on this doctrine in order to "borrow" the more favorable lending authority often bestowed upon other lenders (*e.g.*, credit unions, consumer finance companies and second mortgage loan companies) located in the same State. The New Jersey Supreme Court decision will prevent federally-insured depository institutions from "borrowing" any of the flat fees allowed to competing lenders in the same State, creating the type of competitive disadvantage that this Court forbade in *Tiffany* when it enunciated the "most favored lender" doctrine. Indeed, as discussed above, this is vividly illustrated by New Jersey's preferential treatment of credit unions insofar as late charges are concerned. Moreover, the decision will expose federally-insured depository institutions to substantial liability for countless intrastate transactions made over the years in reliance on the "most favored lender" doctrine.

Notwithstanding the New Jersey Supreme Court majority's apparent belief that its narrow definition of "interest" will redound solely to the benefit of borrowers, that is not necessarily the case. The scope of the term "interest" determines

not only whether a national bank or federally-insured state bank may charge a particular flat fee, but also whether the bank is subject to the stiff sanctions for interest overcharges that are set forth in Section 27(b) of the FDIA and Section 86 of the NBA (12 U.S.C. §86) if it charges the fee in an amount greater than permitted. In fact, many of the cases construing the term "interest" broadly did so in the context of upholding the application of these exclusive federal remedy provisions to non-percentage-based fees.[12] *See* p. 14 n. 3, *supra.*

Given the conflicts in the courts below and the potentially enormous monetary exposure created by the New Jersey Supreme Court's ruling, thousands of federally-insured depository institutions throughout the country now find themselves in a difficult quandary as to how to proceed with respect to their credit card and other lending programs. The New Jersey decision has dramatically disrupted settled and long-unchallenged interstate and intrastate lending practices, and created a cloud of uncertainty over the legality of billions of dollars in fees and charges collected over the years by credit card issuers and other lenders.

The New Jersey decision affects the entire banking industry, tens of millions of credit card customers, the usury laws of numerous states, and many opinions rendered by the federal banking agencies. Given the enormous legal and economic importance of the issues which are presented by this Petition, Greenwood respectfully submits that certiorari is necessary to provide much-needed guidance to everyone concerned.

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12. Moreover, as a result of the New Jersey Supreme Court's rulings, various federally-insured depository institutions may refrain from imposing late charges on delinquent customers in states that prohibit or limit those charges. Lacking late charges as a means to recoup the significant losses caused by the delinquent cardholders, it is inevitable that credit card issuers will have to raise periodic interest rates for all customers, and also constrict the availability of credit for individuals of lesser means who are most likely to become delinquent. *See* Dunkelberg, "Litigation Concerning Late Charges is Major Threat to Credit Card Business," Banking Policy Report (April 6, 1992).

D. The New Jersey Supreme Court Improperly Based Its Decision on Irrelevant Statutes and Legislative Histories

The New Jersey Supreme Court erroneously based its interpretation of Section 27 of the FDIA on the legislative history of an entirely different statute, subsequent bills introduced in Congress but not enacted into law, and New Jersey statutes distinguishing between "interest" and other charges. If allowed to stand, the New Jersey opinion will induce other courts to make similar errors in interpreting federal statutes. Since the New Jersey decision conflicts with many decisions by this Court articulating the principles governing federal statutory interpretation, certiorari should be granted.

1. As did the reversed District Court decision in *Greenwood Trust v. Massachusetts*, the New Jersey Supreme Court based its interpretation of "interest" in Section 27 of the FDIA *not* on the legislative history of that statute, but instead on that of a completely different statute, Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), which amended the National Housing Act and is codified as 12 U.S.C. §1735f-7a(a)(1). (App. 6a, 25a-27a).

Section 27 of the FDIA originated as Section 521 of DIDA. In drafting this statute, Congress borrowed the same language it had used when Section 85 of the NBA was enacted in 1864. Section 501 of DIDA, which has completely dissimilar language, was not enacted until 116 years later, and thus it cannot possibly shed any light on the intended meaning of "interest" in Section 85 of the NBA and Section 27 of the FDIA. *See, e.g., Central Bank of Denver v. First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994) (rejecting parties' reliance on legislative developments in the 1980's to ascertain Congressional intent when it enacted Securities Exchange Act of 1934).

Other reasons why the legislative history of Section 501 of DIDA is completely irrelevant to the meaning of "interest" in Section 27 of the FDIA include the following: (a) Section 501 applies only to first-lien residential mortgage loans, while Sec-

tion 27 applies to any type of loan; (b) Section 501 governs a variety of lenders, including non-depository institutions, while Section 27 applies only to federally-insured state banks; (c) Sections 501 and 27 originated in different bills at different times[13] and had vastly different purposes; (d) Sections 501 and 27 have materially different preemption provisions; (e) Section 501 amended the National Housing Act, while Section 27 amended the Federal Deposit Insurance Act; (f) DIDA was a hodgepodge of diverse and unrelated provisions affecting a wide variety of financial institutions; and (g) there is no evidence that Congress intended "interest" to have a single meaning throughout all of Title V of DIDA (Sections 501-529).[14]

In light of all of the foregoing, the First Circuit correctly held that the legislative history of Section 501 of DIDA has no bearing on the meaning of "interest" in Section 27 of the FDIA:

> The mere fact that both of these sections fell under the broad umbrella of DIDA does not make them fair congeners. Since DIDA contains an amalgam of different pro-

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13. The Senate Banking Committee Report concerning Section 501 of DIDA quoted by the New Jersey Supreme Court was issued on October 15, 1979, several weeks *before* the introduction of the bill (S. 1988) that became Section 27 of the FDIA and two months before the Senate Banking Committee hearings on that bill. Moreover, the statement in the Committee Report that late charges are outside the preemptive scope of Section 501 of DIDA, coupled with "[t]he absence of a comparable comment limiting the preemptive scope of §521 [Section 27] arguably indicates that Congress intended that, absent limiting language, the term 'interest' be interpreted to include more than the numerical periodic interest rate, as is the case under §85 of the National Bank Act." *Hill v. Chemical Bank*, 799 F.Supp. 948, 954 (D. Minn. 1992).

14. Recognizing that there is no nexus between Sections 501 and 522 of DIDA (the latter of which has language almost identical to Section 27 of the FDIA), the FHLBB and OTS have both held that although late charges are not within the preemptive scope of Section 501 (*see* 12 C.F.R. §590.3), they are encompassed within the meaning of "interest" in Section 522. *See* Letter of Karen Solomon, OTS Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 (Sept. 29, 1994); Letter of Harry W. Quillian, FHLBB Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 at p. 62,403 (June 27, 1986).

> visions, the legislative history and purpose of one section of DIDA does not necessarily inform the interpretation of all other parts of that law. . . . In light of the irrefutable evidence that section 521 [Section 27 of the FDIA] was conceived as an offspring of section 85 of the Bank Act, we believe that the district court's reliance upon a comparison between it and DIDA §501 was misplaced. The proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name.

971 F.2d at 830 n. 10. *Accord* FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

2. Once again emulating the erroneous and reversed District Court decision in *Greenwood Trust v. Massachusetts,* the New Jersey Supreme Court also based its ruling on proposed but unenacted legislation in the 1980's that would have exempted certain late charges from preemption. (App. 27a). These bills would *not* have amended Section 27 of the FDIA, and the fact they were not passed into law could just as reasonably support an inference that Congress did *not* want to exempt late charges from preemption. *See United States v. Wise,* 370 U.S. 405, 411 (1962) ("Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment. . .").[15] In any event, this Court has long expressed considerable skepticism concerning efforts to divine Congressional intent from unenacted bills introduced

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15. Congress has amended Section 27 of the FDIA twice in the past eight years. (P.L. 100-86, §101(g)(2), 101 Stat. 552, 563 (1987); P.L. 101-73, §201(a)(1), 103 Stat. 183, 187 (1989)). It must be presumed that, during this time, Congress was well aware of the widespread practice of exporting late charges and the many judicial and administrative agency opinions holding that the term "interest" in Section 27 of the FDIA and the other federal banking statutes embraces flat late charges and other charges. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969); *Board of Governors of Federal Reserve System v. First Lincolnwood Corp.,* 439 U.S. 234, 248 (1978). Had Congress intended a more restrictive construction of the term "interest" in those statutes than the courts and agencies had adopted, it could have amended them to narrow their preemptive scope, but it has not done so.

subsequent to the enactment of the statute whose interpretation is at issue. As this Court observed in *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990):

> [S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. . . *It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.* (emphasis added)

Accord Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1453 (1994) (rejecting arguments based on "failed legislative proposals," the Court stated that "these arguments deserve little weight in the interpretive process"); *United States v. Wise*, 370 U.S. 405, 411 (1962).[16]

3. The New Jersey Supreme Court also erred in basing its construction of the term "interest" in Section 27 of the FDIA on various *New Jersey* statutes that differentiate between "interest" and late charges. (App. 35a-41a). Section 27 is a federal statute that expressly incorporates the laws of the State where the bank is located, and thus there is simply no basis whatsoever for defining "interest" in Section 27 according to the laws of the *borrower's* State.

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16. To the extent that the legislative history of bills actually enacted into law after passage of Section 27 of the FDIA may be relevant, the House Report on the Financial Institutions Reform, Recovery and Enforcement Act of 1989 made it plain that the preemptive scope of Section 522 of DIDA (which is almost identical to Section 27 of the FDIA) is *not* confined to percentage-based periodic rates, but includes other fees and charges as well:

> [The rate authorized by Section 522 of DIDA] may be employed notwithstanding any State constitution or statute concerning *loan related charges*, which is thus preempted. The effect of this section is to preserve the current preemption of state usury laws. (emphasis added).

H.R. Rep. No. 54 at 343 (101st Cong., 1st Sess., pt. 1) (1989).

CONCLUSION

This case involves a federal banking law issue of tremendous national importance that has created a direct conflict between the New Jersey Supreme Court, on the one hand, and the First Circuit, the Supreme Courts of California and Colorado, and all of the federal banking agencies, on the other. The New Jersey decision also conflicts with the "most favored lender" doctrine enunciated by this Court in *Tiffany,* and the interstate exportation of "interest" permitted by this Court in *Marquette.* Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,

Petitioner,

v.

JAMES HUNTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,
Defendant-Respondent.

Argued February 15, 1995 — Decided November 28, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 272 *N.J. Super.* 526 (1994).

Michael D. Donovan, a member of the Pennsylvania bar, argued the cause for appellant (*Spector Gadon & Rosen,* attorneys; *Mr. Donovan* and *Ann Miller,* a member of the Pennsylvania bar, of counsel; *Mr. Donovan, Ms. Miller, Paul R. Rosen* and *Robert L. Grundlock, Jr.,* on the briefs).

Arthur R. Miller, a member of the Massachusetts bar, argued the cause for respondent (*Archer & Greiner,* attorneys; *Mr. Miller* and *Sean T. O'Meara,* on the briefs)

Marilyn A. Bair, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*James J. Ciancia,* Acting Attorney General, attorney; *Andrea M. Silkowitz,* Assistant Attorney General, of counsel).

Richard P. Jacobson submitted a brief on behalf of *amici curiae* The States of Arizona, Delaware, Louisiana, Nevada, Ohio, South Dakota, and Utah (*Dunn, Pashman, Sponzilli, Swick & Finnerty,* attorneys).

Charles N. Riley submitted a brief on behalf of *amicus curiae* Consumer Action (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Beverly R. Porway, Counsel, submitted a brief on behalf of *amicus curiae* Federal Deposit insurance Corporation.

Charles N. Riley submitted a brief on behalf of *amici curiae* the States of Hawaii, Iowa, Maryland, Massachusetts, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Dennis R. Casale submitted a brief on behalf of *amici curiae* The New Jersey Bankers Association, American Bankers Association, American Financial Services Association and Consumer Bankers Association (*Jamieson, Moore, Peskin & Spicer,* attorneys).

Michael J. Dunne submitted a brief on behalf of *amici curiae* Visa U.S.A., Inc., and Mastercard International Incorporated (*Pitney, Hardin, Kipp & Szuch*, attorneys).

The opinion of the Court was delivered by HANDLER, J.

The facts and issues in this case are substantially similar to those in the companion case, *Sherman v. Citibank (South Dakota), N.A.*, ____ *N.J.* ____, *rev'g* 272 *N.J. Super.* 526 (1994), also decided today. Here, New Jersey credit-card holders challenge the legality of late-payment fees assessed by Greenwood Trust, a federally-insured state bank chartered in Delaware. The bank, on the other hand, claims that it is permitted under the Depository Institutions Deregulation and Monetary Control Act to charge out-of-state customers the same interest rate and other lender-imposed charges it is authorized to charge its own customers.

The specific issues are framed by the contentions of the parties. Plaintiff is the named party in this class-action suit. As in *Sherman,* plaintiff argues that New Jersey's Retail Installment Sales Act, *N.J.S.A.* 17:16C-50, -54 (RISA) (since amended , *L.* 1995, *c.* 43) forbids federally-insured state banks that issue credit cards to New Jersey customers from charging late-payment fees, that defendant's advertising and cardmember agreements violate New Jersey's Consumer Fraud Act, *N.J.S.A.* 56:8-2, -19 (CFA), and that the imposition of late-payment fees constitutes a common-law breach of contract

and conversion. Like the Claims in *Sherman,* plaintiff's claims focus on whether the notion of interest includes late-payment charges.

Greenwood Trust, however, argues it is free to charge late-payment fees in New Jersey. It relies on section 521 of the Depository Institutions Deregulation and Monetary Control Act, 12 *U.S.C.A.* § 1831d (DIDA), which expressly mirrors section 85 of the National Bank Act, 12 *U.S.C.A.* § 85 (NBA), and provides that federally-insured state banks may charge borrowers "interest at a rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 1831d(a). Section 521 expressly preempts conflicting state "constitution[s] or statute[s]." *Ibid.* Because it is a federally-insured state bank chartered in Delaware, which includes late fees in its statutory definition of interest, Greenwood Trust argues that RISA and plaintiff's other claims conflict with, and are preempted by, section 521. 272 *N.J. Super.* at 529-30.

The Law Division dismissed the complaint. The Appellate Division affirmed, 272 *N.J. Super.* 526, and we granted plaintiff's petition for certification. 138 *N.J.* 270 (1994).

For substantially the same reasons expressed in *Sherman,* we conclude that this State's usury law prohibiting banks from charging late fees does not conflict with the federal statute giving national banks and federally-insured state banks preferential treatment with respect to lending authority. We hold that DIDA does not preempt the New Jersey RISA's prohibition on late-payment fees, and, therefore, reverse the judgment of the Appellate Division.

I.

Although it is clear that Congress intended section 521 to preempt conflicting state usury provisions, federal preemption of state law requires an actual conflict, not merely a potential, speculative or hypothetical one. *Rice v. Norman Williams Co.,* 458 *U.S.* 654, 659, 102 *S. Ct.* 3294, 3298-99, 73 *L. Ed.* 2d 1042, 1049 (1982); *Brown v. Hotel Employees International Union,* 468 *U.S.* 491, 510, 104 *S. Ct.* 3179, 3185, 82 *L. Ed.* 2d 373, 389 (1963). An actual conflict arises when it is impossible to comply with both state and federal law, or when state law is an

obstacle to the accomplishment of the full purposes and objectives of Congress. *Schneidewind v. ANR Pipeline Co.*, 485 *U.S.* 293, 299-300, 108 *S. Ct.* 1145, 1150-51, 99 *L. Ed.* 2d 316, 325 (1988); *Feldman v. Lederle Lab.*, 117 *N.J.* 125, 135 (1991). However, courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. *Exxon Corp. v. Hunt*, 97 *N.J.* 526, 533 (1984) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 *U.S.* 132, 83 *S. Ct.* 1210, 10 *L. Ed.* 2d 248 (1963); *Huron Cement Co. v. City of Detroit*, 362 *U.S.* 440, 80 *S. Ct.* 813, 4 *L. Ed.* 2d 852 (1960)). "Preemption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 317, 101 *S. Ct.* 1124, 1130, 67 *L. Ed.* 2d 258, 264-65 (1981) (quoting *Florida Lime & Avocado Growers, Inc., supra*, 373 *U.S.* at 142, 83 *S. Ct.* at 1217, 10 *L. Ed.* 2d at 257).

Section 521 of DIDA provides that any federally-insured state bank may:

> notwithstanding any State constitution or statute to the contrary which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill or exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The language and purpose of section 521 essentially imitate that of section 85 of the NBA. *See, e.g., Copeland v. MBNA America Bank, N.A.*, ____ *Colo.* ____ (1995) (slip op. at 14). Courts and federal agencies have interpreted Section 521 as conferring on federally-insured stare banks the

same insulation from State usury laws that national banks have enjoyed for over 100 years under the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 *F.*2d 818, 826-27 (1st Cir. 1992) (concluding that section 521 permits federally-insured state banks to "export" interest rates), *rev'g 776 F. Supp.* 21 (D. Mass. 1991); *Vanderweyst v. First State Bank*, 425 *N.W.*2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most-favored-lender" status), *cert. denied*, 408 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988); *Smiley v. Citibank (South Dakota), N.A.*, 44 *Cal. Rptr.* 2d 441, 465-66 (1995) (Arabian, J., dissenting); *id.* at 467-68 (George, J., dissenting). Thus, "interest," as that term is used in the NBA and DIDA, should be construed uniformly. *E.g., Greenwood Trust, supra*, 971 *F.* 2d at 827 ("historical record clearly requires a court to read the parallel provisions of DIDA and the Bank Act in *pari materia*"); *see also Morales v. Trans World Airlines, Inc.*, 504 *U.S.* 374, 384, 112 *S. Ct.* 2031, 2037, 119 *L. Ed.* 2d 157, 167 (1992) (finding that when legislature borrows exact phrase from existing statute, courts should adopt prior judicial interpretations of that phrase). As demonstrated in *Sherman*, the term "interest" in the NEA does not include late fees, ____ *N.J.* at ____ (slip op. at 5-26); *Smiley, supra*, 44 *Cal. Rptr.* 2d at 469 (George, J., dissenting). We conclude that "interest" in DIDA similarly does not include late fees.

Like section 85, the language in section 521 expressly refers to interest rates. It says nothing about other specific charges associated with lending money. Thus, it would be improvident to impute to Congress the intent to include in the statute a meaning it did not express. Moreover, as we discussed at length in *Sherman*, the legislative history surrounding DIDA's enactment indicates that Congress intended to preempt only state usury laws regarding traditional interest, namely, periodic percentage rates, not other specific charges. *See Sherman, N.J.* at ____ (slip op. at 10-14); *see also Smiley, supra*, 44 *Cal. Rptr.* 2d 441, 465 (Arabian, J., dissenting).

The record of Congressional debate and deliberation concerning the enactment of DIDA is generally supportive of the notion that preemption of credit-card regulation under DIDA

is confined to numerical interest rates. *Ibid.* Even if the sponsors and supporters of DIDA preemption provisions were shown to be committed to achieving total competitive equality of all lending terms offered by state banks and national banks, the simultaneous and persistent concerns of the bill's sponsors to preserve state consumer protection must likewise be acknowledged. During Senate consideration of the conference report on March 27, 1980, Senator Proxmire emphasized the limited preemptive scope of Title V.[1] This limitation, in DIDA's Title V, to annual percentage rates is clear from the Senate floor discussions of mortgage loans, from the Senate Banking Committee Report, and from the hearings on DIDA in the House of Representatives.[2]

II.

In this case, as in *Sherman,* the defendant relies on an agency interpretation of the statute to support its expanded notion of interest. However, to rely upon agency determinations in this case would be to undermine our responsibility to interpret the law by the views of an entity that has heretofore failed to provide a clear and consistent understanding of what

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1. 126 Cong. Rec. S. 6900 (March 27, 1980):

I wish to reemphasize the point made initially in the Senate Banking Committee report that in exempting mortgage loans from State usury limitations, we intend to exempt only those limitations that are included in the annual percentage rate. We do not intend to exempt limitations on prepayment charges, attorneys' fees, late charges or similar limitations designed to protect borrowers.

2. An official of the Federal National Mortgage Association, in response to an inquiry by Rep. St. Germaine, Chair of a House subcommittee considering DIDA, referred to the Senate Banking Committee Report cited above and stated:

> This expression of legislative intent not to displace state laws designed for consumer protection with regard to charges other than charges treated as interest would leave in place those protective enactments in the various states that relate to prepayment penalties, *late charges,* regulations on disclosure of interest charges and restrictions on other costs in connection with loan transactions *other than interest.*
>
> *[Regulation Q. and Related Measures: Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking, Finance and Urban Affairs,* 96th Cong., 2d Sess. 125-26 (1980) (emphasis added).]

Congress intended to include in its definition of interest. Far less than the usual amount of deference to an agency interpretation is appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question. *See Sherman, supra,* ____ *N.J.* at ____ (slip op. at 21-23) (citing *INS v. Cardoza-Fonseca,* 480 *U.S.* 421, 446 n.30, 107 *S. Ct.* 1207, 1221 n.30, 94 *L. Ed.*2d 434, 457 n.30 (1987); *Watt v. Alaska,* 451 *U.S.* 259, 273, 101 *S. Ct.* 1673, 1681, 68 *L. Ed.* 2d 80 (1981); *General Elec. Co. v. Gilbert,* 429 *U.S.* 125, 143, 97 *S. Ct.* 401, 411-12, 50 *L. Ed.* 2d 343 (1976)); *see also Director. Office of Workers' Compensation Programs v. Mangivest,* 826 *F.*2d 1318, 1319-20 (3d Cir. 1987) (finding "ambiguities and inconsistencies in the Director's interpretation . . . of regulations . . . sufficiently great to preclude deference"); *Disabled in Action v. Sykes,* 833 *F.*2d 1113, 1117-19 (3d Cir. 1987), *cert. denied,* 485 *U.S.* 989, 108 *S. Ct.* 1293, 99 *L. Ed.* 2d 503 (1988); *Revak v. National Mines Corp.* 808 *F.*2d 996, 1002 (3d Cir. 1986) (rejecting deference arguments due to inconsistent agency interpretation of statute). Neither the Office of the Comptroller of the Currency (OCC), which regulates national banks, nor the Federal Depository Insurance Company (FDIC), the agency charged with the regulation of federally-insured banks, has issued consistent rulings concerning the interpretation of interest for purposes of the NBA and DIDA. *See Sherman, supra,* ____ *N.J.* at ____ (slip. op. at 23-26) *But cf. Copeland, supra,* ____ *Colo.* at ____ (slip op. at 13) (asserting that "[t]he OCC *consistently* has taken the position that late payment fees are interest" under both section 85 of the NBA and section 521 of the DIDA) (emphasis added). Inconsistent agency rulings should not be guides for a judiciary, the government branch principally responsible for the construction of statutes. *See, e.g., SEC v. Sloan,* 436 *U.S.* 103, 118, 98 *S. Ct.* 1702, 1711, 56 *L. Ed.* 2d 148 (1978); *Federal Maritime Comm. v. Seatrain Lines, Inc.,* 411 *U.S.* 726, 745-46, 93 *S. Ct.* 1773, 1784-85, 36 *L. Ed.* 2d 620, 633-34 (1973).

III.

In addition, New Jersey's State Bank Parity Act, *N.J.S.A.* 17:13B-1 to -2, does not authorize banks located in this State

to charge late-payment fees in the guise of interest. *Sherman*, ____ *N.J.* at ____ (slip. op. at 28-31) Defendant contends, as did the defendant in *Sherman*, that because New Jersey credit unions are authorized to charge late fees to credit-card customers, *N.J.S.A.* 17:13-104b, New Jersey banks are so authorized pursuant to the State Bank Parity Act. That is simply not the case.

The State Bank Parity Act authorizes New Jersey banks to charge the same "rate of interest" charged by credit unions. *N.J.S.A.* 17:13B-2 provides, in pertinent part, that,

> any bank, savings bank, savings and loan association or credit union may charge a *rate* of interest on any class or type of loan at the rate of interest permitted to any other lender by the laws of this State on that class or type of loan.
>
> [*N.J.S.A.* 17:13B-2 (emphasis added).]

Although the Act provides for parity between the rates of charged by both banks and credit unions, the act does not explicitly authorize banks to charge other types of fees. Furthermore, there is no indication that the Legislature implicitly intended to authorize the imposition of such other fees in the State Bank Parity Act. *See Sherman, supra,* ___ *N.J.*___ at ___ (slip op. at 28-32). There are sound reasons grounded in public policy why the Legislature would choose not to equate interest charges with other imposed fees like late charges. For example, because small, individualized lenders, such as credit unions, serve their own members and do not cater to a large market, they cannot spread costs like banks. Thus, they must be permitted to take certain actions to insure their solvency, such as charging late-payment fees. *Ibid.*

We hold that Greenwood Trust has failed to demonstrate a Congressional intention to preempt state usury laws that prohibit discrete, specialized charges that do not directly affect the interest rate. Thus, there is no conflict between New Jersey's RISA statute and DIDA. Prohibiting either national banks or federally-insured state banks from charging late fees does not constitute discrimination because, at the time defen-

dant procured those charges, New Jersey banks were likewise prohibited from assessing them. Unless Congress itself expressly provides otherwise through legislation, we find that New Jersey's RISA statute prohibits Greenwood Trust from charging New Jersey customers late fees.

We note, however, as we did in *Sherman, supra,* ____ *N.J.* at ____ (slip op. at 39), that the late-charges at issue in this case were assessed prior to the enactment of *L.* 1995, *c.* 43, which amended the RISA to specifically allow for late-payment charges on retail charge accounts. The new statute, which took effect on May 29, 1995, applies prospectively only, and therefore is inapplicable to the late-payment charges at issue here. Nevertheless, we recognize that the newly amended RISA statute authorizes holders of retail charge accounts to charge late fees to customers. Thus, it would appear that *N.J.S.A.* 17:16C-42, as amended, permits national banks and federally-insured state banks issuing credit cards to charge late-payment fees. *Sherman, supra,* ____ *N.J.* at ____ (slip op. at 39-42). The charges at issue in this case, however, are not permissible because they were assessed prior to May 29, 1995, the date the amendment became effective.

IV.

The judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Stein, and Coleman join in Justices Handler's opinion. Justice Pollock has filed a separate dissenting opinion in which Justice Garibaldi joins. Justice O'Hern has also filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of
himself and all others similarly situated,
Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,

Defendant-Respondent.

POLLOCK, J., dissenting.

This appeal focuses an the question whether late-payment fees are included in the definition of "interest" in the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.A.* § 1831d ("DIDA"). A related issue is whether the DIDA preempts state laws prohibiting late fees. As in the companion case, *Sherman v. Citibank (South Dakota), N.A.*, ____ N.J. ____ (1995), also decided today, the Law Division dismissed the complaint. The Appellate Division affirmed, 272 *N.J. Super.* 526 (1994). The majority reverses. I dissent.

I.

The facts in this case are substantially similar to those in *Sherman.* James H. Hunter is the plaintiff in a class action challenging the legality of late fees charged to New Jersey holders of credit cards issued by Greenwood Trust, a federally-insured Delaware bank. Hunter argues that New Jersey's Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-50, to -54 ("RISA") forbids federally-insured state banks from charging late fees to New Jersey consumers. He also argues that Greenwood Trust's cardmember agreement violates *N.J.S.A.* 56:8-2 and -19 (which prohibit consumer fraud), and that the imposition of late fees constitutes a common-law breach of contract and conversion. Like the claims in *Sherman,* Hunter's claims depend on whether interest includes late fees.

The DIDA, like the National Bank Act (NBA), which was the subject of *Sherman,* authorizes federally-insured state

banks to charge borrowers "interest . . . allowed by the laws of the State . . . where the bank is located." Delaware's statutory definition of interest includes late fees: "If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge." *Del. Code Ann.* tit. 5, § 950 (1994). Thus, Greenwood Trust maintains both that the DIDA expressly authorizes charging late fees as interest and that the DIDA preempts conflicting state laws.

Hunter, however, contends that late fees are not interest under the DIDA. Specifically, he asserts that "interest" refers only to the periodic percentage rate charged on outstanding balances. He argues that his state-law claims do not conflict with the DIDA, and therefore that the DIDA does not preempt them. Alternatively, Hunter argues that the DIDA's express preemption clause preempts only his statutory, but not his common-law, claims.

II.

This case requires us to determine the meaning of "interest . . . allowed by the laws of the State . . . where the bank is located," as that phrase is used in the DIDA. Ultimately, matters of statutory construction involve a determination of congressional intent. *E.g., Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n,* 499 *U.S.* 117, 128, 111 *S. Ct.* 1156, 1163, 113 *L. Ed.* 2d 95, 106-07 (1991); *Roig v. Kelsey,* 135 *N.J.* 500, 515 (1994). In the DIDA, Congress did not expressly define "interest." Nor does a fair reading of the legislative history disclose the intended meaning of that term.

As discussed more fully in my dissent in *Sherman, supra,* ____ *N.J* at ____ (slip op. at 6), the Civil War Congress enacted section 85 of the NBA to protect the newly-created national banking system from unfriendly state usury laws. Section 85 provides that any national bank

> may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at a rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day

> commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A. § 85.*]

In *Tiffany v. National Bank of Missouri,* 85 *U.S.* (18 Wall.) 409, 411-13, 21 *L. Ed.* 862, 863-64 (1873), the United States Supreme Court held, pursuant to section 85, that the defendant national bank could charge its borrowers the highest interest rate authorized to any lender in that state. The Court acknowledged that the "most favored lender" doctrine might disadvantage state-chartered banks, but relied on Congress's intent to create a strong national banking system immune from hostile state legislation. *Id.* at 412-13, 21 *L. Ed.* at 863-64.

A century later, the Court determined that a national bank located in one state could charge its borrowers in other states the highest interest rate allowed to any lender in its home state. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.,* 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978).

In the years following *Marquette,* interest rates soared. Although national banks could charge interest at a rate tied to the federal discount rate, local usury laws constrained state banks. *See Greenwood Trust Co. v. Massachusetts,* 971 *F.* 2d 818, 826 (1st Cir. 1992), *cert. denied,* ____ *U.S.* ____, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993). Congress rectified the imbalance by enacting the DIDA. *Ibid.*

Section 521 of the DIDA ("section 521") provides that

> [i]n order to prevent discrimination against any [federally-insured state bank], such State bank may . . . notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is

> located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The text of section 521 virtually mirrors that of section 85. Section 521 articulates Congress's intent that the purpose of the DIDA, like that of the NBA, is to prevent discrimination against federally-insured state banks. Unsurprisingly, courts and banking regulators have interpreted section 521 as protecting federally-insured state banks from hostile state laws, just as section 85 protects national banks from those laws. *Greenwood Trust, supra,* 971 *F.* 2d at 826-27 (concluding that section 521 permits federally-insured state banks to "export" interest rates); *VanderWeyst v. First State Bank,* 425 *N.W.2d* 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most favored lender" status), *cert. denied,* 488 *U.S. 943, 109 S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988); Letter by Douglas H. Jones Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730 (July 8, 1992) (most favored lender and exportation principle); Letter by Frank L. Skillern, Jr., General Counsel, FDIC No. 81-3 (February 8, 1981) (most favored lender status); Letter by Kathy A. Johnson, Attorney, FDIC No. 81-7 (March 17, 1981) (exportation principle).

I agree with the majority, *ante* at ____ (slip op. at 6), that "interest," as that term is used in the NBA and the DIDA, should be construed uniformly. *E.g., Greenwood Trust, supra,* 971 *F.* 2d at 827; *see also Morales v. Trans World Airlines, Inc.,* 504 *U.S.* 374, 383-84, 112 *S. Ct.* 2031, 2037, 119 *L. Ed.* 2d 157, 167 (1992) (finding that when legislature borrows exact phrase from existing statute, courts should adopt prior judicial interpretations of that phrase). Substantially for the reasons set forth in my *Sherman* opinion, ____ *N.J.* ____, I conclude that "interest" in the DIDA includes late fees.

Interpretations of the Federal Depository Insurance Company (FDIC), the agency charged with the regulation of federally-insured banks, 12 *U.S.C.A.* § 1811, support that conclusion. In my dissent in *Sherman, supra,* ____ *N.J.* at ____

(slip op. at 13-14), I noted that when Congress does not define a statutory term, courts should accept a reasonable interpretation of the term of the appropriate administrative agency. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 *U.S.* ____, ____, 115 *S. Ct.* 810, 813, 130 *L. Ed.* 2d 740, 747 (1995); *Chevron, U.S.A., Inc. v. NRDC*, 467 *U.S.* 837, 843-44, 104 *S. Ct.* 2778, 2782-83, 81 *L. Ed.* 2d 694, 703-04 (1984) ; *Lammers v. Board of Educ.*, 134 *N.J.* 264, 274 (1993); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 327 (1984); Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 3.3 (3d ed. 1994) (discussing *Chevron*); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 516-18 (1989) (same). As described in my dissent in *Sherman, supra*, ____ *N.J.* at____ (slip op. at 16-18), the Comptroller of the Currency, which regulates national banks, has long ruled that interest could include late fees. Like the Comptroller, the FDIC has concluded that interest, for purposes of section 521, includes late fees that are authorized by a bank's home state. Letter from Douglas H. Jones, Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep*, (CCH) ¶ 81,534 at 55,730 (July 8, 1992). As in *Sherman*, I find that interpretation reasonable.

III.

Whether a federal law, such as the DIDA, preempts a state law is a matter of congressional intent. *E.g., Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, ____, 112 *S. Ct.* 2608, 2617-18, 120 *L. Ed.* 2d 407, 422-23 (1992). The inclusion of an express preemption clause unmistakably declares the intent of Congress to preempt conflicting state statutes. *Ibid.*

The DIDA, unlike the NBA, includes such an express preemption clause. Section 521 permits a national bank to charge interest at a rate allowed by its home state "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . ." The word "notwithstanding" suggests that Congress intended the DIDA to preempt conflicting state statutes. Thus, under the language of

the DIDA's express preemption clause, the question is whether RISA's prohibition against late fees conflicts with section 521.

In *Sherman, supra,* ____ *N.J.* at ____ (slip op. at 28), I concluded that section 85 conflicts with state laws, such as RISA, that prohibit late fees. I likewise submit that section 521 conflicts with state laws prohibiting such fees. Under its express preemption clause, the DIDA preempts Hunter's statutory claims.

I further determined in *Sherman* that New Jersey's State Bank Parity Act authorizes banks located in this State to charge interest in the form of late-payment fees. ____ *N.J.* at ____ (slip op. at 27-28); *see* Letter by Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994). Because I conclude that New Jersey banks may charge late fees to their New Jersey customers, I also conclude that a state law prohibiting out-of-state federally-insured state banks from charging such fees impermissibly discriminates against those institutions. *See Sherman, supra,* ____ *N.J.* at ____ (slip op. at 28). That conflict with the congressional intent to prevent discrimination against federally-insured state banks further supports my conclusion that the DIDA preempts state statutes that prohibit late fees.

IV.

Hunter argues alternatively that even if the DIDA preempts his statutory claims, his common-law claims must survive. Specifically, he argues that the United States Supreme Court's holding in *Cipollone, supra,* 505 *U.S.* 504, 112 *S. Ct.* 2608, 120 *L. Ed.* 2d 407, limits the DIDA's preemptive scope to "State constitution[s] or statute[s]." 12 *U.S.C.A.* § 1831d(a). I disagree.

The Court recently addressed a comparable issue in *Freightliner Corp. v. Myrick,* 514 *U.S.* ____, 115 *S. Ct.* 1483, 131 *L. Ed.* 2d 385 (1995). In *Freightliner,* the Court clarified that *Cipollone* does not preclude implied preemption whenever Congress includes an express preemption clause in a federal statute. 514 *U.S.* at ____, 115 *S. Ct.* at 1487-88, 131 *L. Ed.* 2d at 393. "At best, *Cipollone* supports an inference that an

express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* at 115 *S. Ct.* at 1488, 131 *L. Ed.* 2d at 393. The Court emphasized that a statute's preemptive scope is a function of congressional intent. *Id. at* ____, 115 *S. Ct.* at 1487, 131 *L. Ed.* 2d at 393.

I believe that Congress intended that section 521 of the DIDA should have the same preemptive effect as section 85 of the NBA. A recent interpretive letter by the FDIC further supports that conclusion. Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 93-27, *Fed. Banking L. Rep.* (CCH) ¶ 81,635 at 55,838 (July 12, 1993) (concluding that Congress intended to confer upon federally-insured banks the same protections that section 85 of the NBA confers on national banks). I conclude that Hunter's common-law claims, like his statutory claims, conflict with the DIDA and are pre-empted.

V.

In *Sherman, supra,* ____ N.J. at ____ (slip op. at 28-29), I disagreed with the majority's conclusion that in the future, out-of-state federally-insured state banks may charge late fees on delinquent customers, but only up to $10. Although I agree that those banks may charge such fees, I disagree that state law may limit the amount so charged. As a national banking law, the DIDA takes precedence over conflicting state law. Under the authority of the DIDA, Greenwood Trust may impose late fees as authorized by its home state, Delaware, without reference to another state's limitation on those fees. Consequently, the RISA's limitation on late charges must yield to the DIDA, as construed by the FDIC.

Accordingly. I respectfully dissent.

Justice Garibalidi joins in this dissent.

SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,
Defendant-Respondent.

O'HERN, J., dissenting.

I dissent for the reasons stated in my separate opinion in *Sherman v. Citibank,* ____ *N.J.* ____, also filed today.

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of himself and all others and all others similarly situated,

Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Defendant-Respondent.

Argued February 15, 1995 — Decided November 28, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 272 *N.J. Super.* 435 (1994).

Michael D. Donovan, a member of the Pennsylvania bar, argued the cause for appellant (*Spector Gadon & Rosen,* attorneys; *Mr. Donovan* and *Ann Miller,* a member of the Pennsylvania bar, of counsel; *Mr. Donovan, Ms. Miller, Paul R. Rosen,* and *Robert L. Grundlock, Jr.,* on the briefs).

Louis R. Cohen, a member of the District of Columbia bar, argued the cause for respondent (*Dechert Price & Rhoads,* attorneys; *Mr. Cohen, George G. O'Brien, Matthew V. DelDuca,* and *Robert D. Rhoad,* on the briefs).

Marilyn A. Bair, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*James J. Ciancia,* Acting Attorney General, attorney; *Andrea M. Silkowitz,* Assistant Attorney General, of counsel).

Richard P. Jacobson submitted a brief on behalf of *amici curiae* The States of Arizona, Delaware, Louisiana, Nevada, Ohio, South Dakota, and Utah (*Dunn, Pashman, Sponzilli, Swick & Finnerty,* attorneys).

Irene E. Dowdy, Assistant United States Attorney, submitted a brief on behalf of *amicus curiae* Office of the Comptroller of the Currency (*Faith S. Hochberg,* United States Attorney, attorney).

Charles N. Riley submitted a brief on behalf of *amicus curiae* Consumer Action (*Tomar, Simonoff, Adourian & O'Brien*, attorneys).

Charles N. Riley submitted a brief on behalf of *amici curiae* the States of Hawaii, Iowa, Maryland, Massachusetts, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin (*Tomar, Simonoff, Adourian & O'Brien*, attorneys).

Mark L. First submitted a brief on behalf of *amicus curiae* Mellon Bank (DE), N.A. (*Reed, Smith, Shaw & McClay*, attorneys).

Dennis R. Casale submitted a brief on behalf of *amici curiae* The New Jersey Bankers Association, American Bankers Association, American Financial Services Association and Consumer Bankers Association (*Jamieson, Moore, Peskin & Spicer*, attorneys).

Jeffrey M. Keiser submitted a brief on behalf of *amici curiae* Trial Lawyers for Public Justice, P.C., and Bankcard Holders of America, Inc.

Michael J. Dunne submitted a brief on behalf of *amici curiae* Visa U.S.A., Inc., and Mastercard International Incorporated (*Pitney, Hardin, Kipp & Szuch*, attorneys).

The opinion of the Court was delivered by HANDLER, J.

In this case, as in the companion case of *Hunter v. Greenwood Trust Co.*, __*N.J.* __, *rev'g* 272 *N.J. Super.* 526 (1994), also decided today, New Jersey credit-card customers contend that New Jersey's usury laws prohibit banks that issue those cards from charging late-payment fees to New Jersey customers.

The issues before us are more specifically framed by the claims and defenses of the respective parties. Plaintiff, as a named party in a class-action suit, challenges the legality of the late-payment fees that are charged to New Jersey holders of defendant Citibank (South Dakota) credit cards. Plaintiff argues that New Jersey's Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-50, -54 (RISA), forbids national banks that

issue creditcards to New Jersey consumers from charging late-payment fees. Plaintiff also argues that defendant's failure to disclose in its cardmember agreements and advertising that late-payment fees are prohibited by New Jersey law violates New Jersey's Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-2, -19. Finally, plaintiff contends that the imposition of late-payment fees constitutes a common-law breach of contract and conversion.

Defendant relies on section 85 of the National Bank Act (NBA), which provides that a national bank may charge borrowers "interest at a rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 85. Citibank is a national bank chartered in South Dakota, and South Dakota includes late-payment fees in its statutory definition of interest. 272 *N.J. Super.* at 438. Citibank, therefore, contends that plaintiff's RISA claim, as well as plaintiff's other claims, conflict with, and are preempted by, section 85. *See id.* at 439. Thus, Citibank argues it is free to charge late-payment fees in New Jersey.

Following the commencement of this action, the Law Division granted the bank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super.* 435 (1994). We granted plaintiff's petition for certification, 138 *N.J.* 270 (1994), and now reverse the dismissal of plaintiff's claims.

We determine that the understanding of "interest" as expressed and authorized in the NBA does not include distinctive and contingent loan terms or charges, such as late fees, that are unrelated to interest rates. We hold that late-payment fees are not "interest" within the intendment and purposes of the applicable federal statute. Rather, "interest at a rate allowed by the laws of the State . . . where the bank is located" refers only to the periodic percentage rate charged on outstanding balances. Therefore, plaintiff's state-law defenses to the bank's charges do not conflict with federal law, are not preempted, and the late-payment fees are illegal under New Jersey law.

I.

Since the early years of the Republic, the states have generally resisted the development of national banks and favored their own state-chartered banks through regulatory legislation. William Oscar Scroggs, *A Century of Banking Progress* 50-51 (1924); John J. Knox, *A History of Banking in the U.S.* 12 (2d ed. 1969). The Supreme Court has, since *M'Culloch v. Maryland,* 17 *U.S.* (4 Wheat) 316, 4 *L. Ed.* 579 (1819), generally limited federal statutory involvement by construing preemption narrowly and giving relatively free rein to state usury law regulations. *See Anderson Nat'l Bank v. Luckett,* 321 *U.S.* 233, 64 *S. Ct.* 599, 88 *L. Ed.* 692 (1944); *McClellan v. Chipman,* 164 *U.S.* 347, 17 *S. Ct.* 85, 41 *L. Ed.* 461 (1896).

This Court, in considering preemption claims, must be cautioned by the longstanding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 *U.S.* 725, 746, 101 *S.Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 595 (1981), and that it should not unnecessarily disturb "the federal-state balance." *United States v. Bass,* 404 *U.S.* 336, 349, 92 *S. Ct.* 515, 523, 30 *L. Ed.* 2d 488, 497 (1971). Indeed, greater restraint ought apply to preemption of spheres traditionally occupied by the states. Where the field that Congress is said to have preempted has been traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 *U.S.* 218, 230, 67 *S.Ct.* 1146, 1152, 91 *L. Ed.* 1447 (1947).

"It is well settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain 'traditionally occupied' by the states." *Greenwood Trust Co. v. Massachusetts,* 776 *F. Supp.* 21, 27-28 (D. Mass. 1991), *rev'd,* 971 *F.*2d 818 (1st Cir. 1992) *cert. denied,* ___*U.S.* ___, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993) (citing *Lewis v. BT Inv. Managers, Inc.,* 447 *U.S.* 27, 38, 100 *S.Ct.* 2009, 2016, 64 *L. Ed.* 2d 702, 713 (1980) ("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local

concern")); *Smiley v. Citibank (South Dakota), N.A.*, 44 *Cal. Rptr.* 2d 441, 465-66 (1995) (Arabian, J., dissenting) (same); *id.* at 467-68 (George, J., dissenting) (same). Accordingly, "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required this area." *General Motors Corp. v. Abrams*, 897 *F.*2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission consent decree preempted major elements of the local law). Congress' failure to include an express preemption clause in section 85 necessitates a careful examination of whether the NBA conflicts with RISA's prohibition of late-payment fees.

Section 85 provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory or District where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . .
>
> [12 *U.S.C.A. § 85 (emphasis added).]*

On its face, section 85 immunizes national banks that lend money beyond their home-state's borders from local usury laws that might give local banks a competitive advantage. It also protects national banks during periods of inflation by overriding even the home-state's usury laws and permitting national banks to charge interest at a rate tied to the federal discount rate. *E.g. Tiffany v. National Bank*, 85 *U.S.* (18 Wall) 409, 412-13, 21 *L. Ed.* 862, 863-64 (1874) (holding that Congress, by enacting NBA, intended to protect national banks from hostile state usury laws); *Roper v. Consurve, Inc.*, 578 *F.* 2d 1106 (5th Cir. 1978), *aff'd sub nom., Deposit Guaranty Nat'l Bank v. Roper*, 445 *U.S.* 326, 100 *S. Ct.* 1166, 63 *L. Ed.* 2d 427 (1980) (holding section 85 was designed by Congress to mandate parity between national banks and local lenders). However, neither the plain meaning of the terms "rate" and "inter-

est" in section 85, nor the legislative history of that provision indicates that these terms carry the expansive meaning inferred by defendant. *See Smiley, supra,* 44 *Cal. Rptr.* 2d at 469 (George, J., dissenting).

Since 1874, the Supreme Court has interpreted section 85 as entitling a national bank to charge the highest interest rate allowed to lenders by the laws of the state in which the bank is located. *Tiffany, supra,* 85 *U.S.* at 411-13, 21 *L. Ed.* at 863-64 "The only mode of guarding against [state discrimination] was . . . to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate"). Courts have recognized that *Tiffany* construed section 85 to place national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally and not necessarily at a rate applicable to state banks, which might be lower. This ability to "borrow" an interest rate has come to be known as the "most-favored-lender" doctrine. *See, e.g., Fisher v. First Nat'l Bank,* 548 *F.*2d 255 (8th Cir. 1977) (recognizing that notwithstanding limitations on interest imposed on state banks by Nebraska law, national bank located in Nebraska could legally charge, with respect to credit-card transactions, rates allowed by Nebraska law to small loan companies).

In *Marquette National Bank v. First of Omaha Service Corp.,* 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978), the Supreme Court relied on the NBA and its most-favored-lender doctrine to allow a national bank chartered in Nebraska to charge its creditcard customers in Minnesota a rate of interest authorized in Nebraska, but prohibited by usury law restrictions in Minnesota. *Id.* at 313-15, 99 *S.Ct.* at 548-49, 58 *L. Ed.* 2d at 545-46. The *Marquette* Court recognized that the "exportation" of interest rates from a national bank's "home state" into a foreign state would "significantly impair the ability of the States to enact effective usury laws," but it found that such impairment "has always been implicit in the structure of the National Bank Act since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Id.* at 318, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (citation omitted) (footnote omitted).

The Court, nonetheless, suggested Congressional action would be necessary to check the preemptive effect of the NBA in a time of national bank deregulation, tightened credit availability, and an increasingly nationalized credit-card lending system:

> This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.
>
> [*Id.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548].

Marquette does not mandate or encourage an extension of the "most-favored-lender" status to expand the definition of "rates" to include other non-interest rate charges. The national bank's authorized exportation of lending terms in *Marquette* was limited to numerical percentage-rate interest terms. The Court made no mention of the exportation of other credit-card terms, such as late charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit-card loans could be imposed on customers in other states. *See Smiley, supra,* 44 *Cal. Rptr.* 2d at 465 (Arabian, J., dissenting).

In the years following *Marquette,* Congress embarked on a mission to deregulate the banking industry. Interest rates soared, and while national banks could charge interest at a rate tied to the federal discount rate, state banks were constrained by local usury laws. *See Greenwood Trust, supra,* 971 *F.*2d at 826. Congress sought to rectify that obvious inequity by enacting the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.A.* § 1831d (DIDA). *Ibid.* The language of section 527 of DIDA essentially mirrors that of section 85 of the NBA. Courts and federal agencies have interpreted section 521 as conferring on federally-insured state banks the same insulation from state usury laws that national banks have enjoyed under the NBA. *Id.* at 826-27 (concluding that Section 521 permits federally-insured state

banks to "export" interest rates); *Vanderweyst v. First State Bank*, 425 *N.W.*2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most favored lender" status), *cert. denied*, 488 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988).

The legislative history of DIDA is instructive to our understanding of Congress' general understanding of interest and its intent with respect to the notion of interest contained in the NBA. *E.g. Copeland v. MBNA America Bank, N.A.*,__ *Colo.* __ (1995) (slip op. at 14). Although the NBA was enacted 100 years earlier the same tensions, namely parity between federal and state lenders and preservation of local usury laws, were present and these conflicting considerations generated substantial concerns surrounding the passage of the earlier banking statute.

The record of Congressional debate and deliberation concerning the enactment of DIDA strongly supports the understanding that preemption of credit-card regulation under DIDA is confined to traditional numerical interest rates. The central unifying purpose of DIDA was to provide for increased access to home mortgage loans. Section 501 of DIDA provided for preemption of state usury limits on mortgage loans in a manner virtually identical to the treatment of other loans (including credit-card agreements) in Title V of the Act, which contains section 521.

The Senate Report of deliberations over section 501 of DIDA restricts preemption and expressly reserves the regulation of "late charges" to the states.

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.
>
> [S. Rep. No. 96-368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 *U.S. Code Cong. and Ad. News*, Vol. 2, 236, 255.]

Subsequent legislative history links preemption concerns in section 501 both to the consideration of section 521, and to DIDA in its entirety as passed on March 27-28, 1980. Notably,

Congress passed section 501 at the same time, and the same title (Title V) of the same act, as section 521.

During the discussion on the Senate floor of the various bills that figured in the development of DIDA, Senators Pryor and Bumpers proposed an amendment, S. 1988, to give state-chartered institutions "competitive equality" with national banks by allowing them to charge interest at one percent above the federal discount rate. 125 *Cong. Rec.* 30655 (1979). Senator Proxmire, floor manager of the Senate bills under discussion, and chairman of the Senate Banking Committee, understood the proposed amendment to override state usury laws and emphasized that there was "a sharp division and difference of opinion in the Senate." *Id.*

Separate hearings on the Pryor-Bumpers initiative, S. 1988, 96th Cong, 1st Sess, (1979) were held December 17, 1979, and though it was not reported out of committee, the bill's language was substantially incorporated into House Bill 4986, H.R. 4986, 96th Cong., 1st Sess. (1979), which was, in turn, enacted as DIDA. William M. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law,* 37 *Bus. Law.* 1079, 1096-97 and n.102 (1982).

A fair reading of the legislative history indicates that Congressional concern was focused with particularity on numerical or percentage interest rates. In introducing S. 1988, Senator Pryor noted, "A national bank may charge one percent above the Federal discount rate, notwithstanding any State laws setting an interest-rate ceiling . . . [which] obviously discriminates in the strongest possible way against State banks. 125 *Cong. Rec.* 30655 (1979). The great bulk of the subsequent committee testimony and discussion indicates that the proposed preemption amendment was limited because, in Senator Pryor's words, it "would merely allow State chartered, federally insured banks . . . to charge the same interest rate as national banks." *Id.* In fact, there were only two references to wider displacement of state law though expansion of the "most-favored-lender doctrine." Senator Bumpers, cosponsor of the preemption amendment, confined his remarks to

numerical interest rate disparities and remarked pointedly, "I do not think it is particularly healthy to be overriding state law." *Id.*

Post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late fees by credit-card issuers. In 1981 and in 1983-84 the Senate (but not the House) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late charges from preemption. *Greenwood Trust, supra,* 776 *F. Supp.* at 31 (citing *Hearings on S. 730 Before the Senate Committee on Banking, Housing and Urban Affairs,* 98th Cong., 1st Sess. (April 12, 1983); Hearings on S. 1720, 1981.[1] The failed S. 730 bill also expressly granted states the right to override preemption.

Thus, the fact that Congress was specifically concerned about effecting a preemption limited to numerical interest rates is significant. If we cannot attribute to legislative initiative of 15 years ago the intent to include discrete, specialized

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1. S. 730, the "Credit Deregulation and Availability Act of 1983," would have amended Title V of DIDA to provide, in relevant part, as follows:

> Sec. 531. The provisions of the constitution or laws of any State prohibiting, restricting, or in any way limiting the rate, nature, type, amount of, or the manner of calculating or providing or contracting for covered charges that may be charged, taken, received or reserved shall not apply to any extension of consumer credit made by the creditor.
>
> Sec. 532. (a) As used in this part —
>
> (1) The term "covered charges" means —
>
> (A) interest, discount, points, a time price differential, or any similar fees, charges, or other compensation paid to the creditor and arising out of the credit agreement or transaction for the use of credit or credit services. *The term shall not include, however, fees, charges or other amounts paid to the creditor or arising out of the credit agreement or transaction that are paid or arise solely as the result of the failure or refusal of the debtor to comply with the terms and conditions of the debtor's agreement with the creditor, including without limitation the fact that the obligation is not repaid in accordance with the payment schedule.* . . .
>
> [129 *Cong. Rec.* S. 17045-17046 (November 18, 1983) (emphasis added).]

charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier. That is especially so when the later statute substantially paralleled the language of the former, and it was passed in an effort to give federally-insured state banks status equal to national banks that had enjoyed a superior status since the enactment of the earlier act. Thus, it would be contrary to common sense to conclude that in enacting the NBA, Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance. Or that, correlatively, it intended to prohibit states from regulating specific terms and conditions of loans and preventing lenders from charging late-payment fees.

II.

Defendant relies on case law from other jurisdictions to support its expansive interpretation of "interest", specifically, *Greenwood Trust, supra,* 971 *F.*2d 818 and *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992). We find, however, that the reasoning expressed in the *Greenwood Trust* line of cases and the authorities cited by the *Greenwood Trust* court are unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of interest.

Greenwood Trust held that prior case law supported the notion that federal common law construes interest to encompass a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate. 971 *F.*2d at 829 (citing *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.*2d 781, 787-88 (9th Cir. 1982); *Fisher v. First Nat'l Bank,* 548 *F.*2d 255, 258-61 (8th Cir. 1977); *Panos v. Smith,* 116 *F.*2d 445, 446-46 (6th Cir. 1940); *Cronkleton v. Hall,* 66 *F.*2d 384, 387 (8th Cir.), *cert. denied,* 290 *U.S.* 685, 54 *S. Ct.* 121, 78 *L. Ed.* 590 (1933); *Nelson v. Citibank (South Dakota) N.A.,* 794 *F. Supp.* 312, 318 (D. Minn. 1992)). Inimical to the holding in *Greenwood Trust,* a careful examination of the cases cited does not establish that Congress intended to

include late-payment fees within a federal definition of interest under either section 85 or section 521.

Contrary to the *Greenwood Trust* court's interpretation, *American Timber & Trading Co., supra,* did not hold that a compensating-balance requirement was interest under section 85. Rather, the court held that a compensating-balance requirement reduces the principal amount of a loan for purposes of calculating effective interest. 690 *F.*2d at 787-88. In addition, *Fisher, supra,* did not expressly hold that cash-advance fees were interest under section 85. In that case, the plaintiff challenged the periodic interest and cash-advance fees charged by an out-of-state national bank. 548 *F.*2d at 256. The court applied the most favorable laws covering any class of lenders in the bank's home state, which permitted certain lenders to charge 30% interest on a balance under $300, and held that the charges were not usurious. *Id.* at 258-61. The court did not even discuss the distinction between periodic interest rates and the flat fees charged.

In *Panos, supra,* the court did not hold that mortgage taxes and recording fees were interest under section 85. Rather, the court held that such charges, which were deducted from the principal received by the borrower, reduced the principal amount of a loan for purposes of calculating effective interest. 116 *F.*2d at 446-47.

In *Cronkleton, supra,* the court did not conclude that a bonus or commission was interest under section 85. The Eighth Circuit's holding (in relevant part) was limited to a modification of the district court's award of damages for usury under the NBA. The court's opinion does not provide a detailed account of the facts. However, it appears that in February 1926, the defendant, a national bank, loaned $55,000 to the plaintiffs. 66 *F.*2d at 385. The contractual periodic rate of interest was not usurious. *Ibid.* But, in November 1930, plaintiffs paid to the bank an additional $1,000. *Ibid.* Although the district court "made no findings as to bonuses paid," the court characterized the additional payment as a bonus or commission. *Id.* at 386. The court then noted that "in determining the rate 'reserved' or 'charged' ... the taking of a 'bonus' or

'commission' . . . may enter in to render an otherwise lawful rate unlawful and usurious." *Id.* at 387.

The *Greenwood Trust* court suggested that *Nelson, supra,* decided months earlier, held that late-payment fees were interest under section 85. 971 *F.*2d at 829. However, *Nelson* expressly disclaimed that conclusion. 794 *F. Supp.* at 320 ("the question of whether national banks may export terms other than periodic interest charges goes to the merits of the case; deciding that question on a motion to remand is inappropriate"). The court held only that the defendant's claim that section 85 preempted plaintiffs' state law claims raised a substantial federal question. *Id.* at 315-16.

The court in *Greenwood Trust* also cited several cases to support the proposition that section 85 "adopts the entire case law of [a state bank's home] state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state." 971 *F.*2d at 829 (citing *First Nat'l Bank v. Nowlin,* 509 *F.*2d 872, 876 (8th Cir. 1975); *accord Roper v. Consurve, Inc.,* 777 *F. Supp.* 508, 510-11 (S.D. Miss. 1990), *aff'd,* 932 *F.*2d 965 (5th Cir.) (table), *cert. denied,* __ *U.S.* __, 112 *S. Ct.* 181, 116 *L. Ed.* 2d 142 (1991); *Daggs v. Phoenix Nat'l Bank,* 177 *U.S.* 549, 555, 20 *S. Ct.* 732, 735, 44 *L. Ed.* 882 (1900); *Union Nat'l Bank v. Louisville, N.A. & C. Ry.,* 163 *U.S.* 325, 331, 16 *S. Ct.* 1039, 1042, 41 *L. Ed.* 177 (1896); *Bartholomew v. Northampton Nat'l Bank,* 584 *F.*2d 1288, 1295 (3d Cir. 1978); *McAdoo v. Union Nat'l Bank,* 535 *F.*2d 1050, 1055-58 (8th Cir. 1976); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.,* 464 *F.*2d 855, 861-64 (6th Cir. 1972)). Those cases, however, do not demonstrate that Congress intended to incorporate a state definition of interest that would authorize states unilaterally to incorporate non-percentage rate charges into an exportable definition under section 85. Moreover, none of those cases involve a definition of interest for exportation purposes where the definition varied between states.

Nowlin, supra, exemplifies the *Greenwood Trust* court's misplaced reliance on previous cases construing the NBA. In *Nowlin,* a national bank in Arkansas loaned money to the plaintiff, who agreed to repay the loan in installments. 509

*F.*2d at 874. Instead of amortizing the loan over the agreed term, the bank "discounted" the notes by 8%; that is, the bank gave the plaintiff the requested sum, but an additional 8% for every year of the notes' term was immediately added to the outstanding principal amount. *Ibid.* The plaintiff then had to repay the adjusted principal amount in equal payments over the term. *Ibid.* Because all interest was calculated up-front based on the initial loan amount, instead of being calculated periodically on a declining principal balance, the national bank achieved an effective yield of nearly 16%. *Ibid.*

The bank did not dispute that Arkansas considered usurious interest rates over 10%. *Id.* at 876. Furthermore, the bank did not dispute that a state bank could not "discount" notes in a like manner because Arkansas case law defined interest for purposes of its usury laws as "effective yield." *Ibid.* However, the bank argued that because it was a national bank, it was subject only to section 85, which defined interest narrowly to include only percentage rates charged, not effective yields. *Ibid.* Because its 8% discount rate was less than the 10% Arkansas-usury rate, the bank argued that it did not violate the NBA. *Ibid.*

The court rejected the bank's arguments. After discussing the objectives of section 85, the court held that such a narrow interpretation would be inconsistent with Congress' desire to foster competitive equality between state and national banks. *Id.* at 880. Thus, the court held, Arkansas' definition of interest was incorporated into section 85. *Ibid.*

Contrary to the *Greenwood Trust* Court's conclusion, *Nowlin* does not offer an expanded definition of the term "rate," but rather shows only that calculation of chargeable interest rates must take "the case law of the state" into account. The state law regarding discounting was given substantial weight because discounting, unlike late-fee charges, directly affects the numerical interest rate by altering the percentage rate over time. It is noteworthy that the *Nowlin* decision involved the intra-state, not inter-state, application of Arkansas' definition of interest. Thus, it said nothing about exporting that definition to a foreign state where state-usury laws are more restrictive. Moreover, the case should be read

as a judicial attempt to protect state usury laws at the expense of the federal most-favored-lender doctrine.

Defendant also refers, as does the dissent, to *Smiley v. Citibank, supra,* 44 *Cal. Rptr.*2d 441 (1995), to support its position that "interest" under section 85 includes late charges. *Post* at __ (slip op. at 4). Similar use is made of *Copeland v. MBNA America Bank, N.A., supra,* __ *Colo.* __ (1995). The majority in *Smiley* bases that conclusion in large measure on its understanding of historical legal usage. *Smiley, supra,* at 449-51. *See also Copeland, supra,* at __ (slip op. at 11-13) (same). In our view, however, interest in its historical setting is limited to a periodic charge expressed as a percentage of a principal balance due. See discussion, *supra,* at 25-28. The majority in *Smiley* also concluded that if interest does not include late charges then a state could discriminate against a national bank to make it unprofitable for it to lend money in that state. *Smiley, supra,* at 451. However, a state cannot discriminate against a national bank by permitting state banks to charge late fees or higher late fees while prohibiting a national bank from charging those fees. See discussion, *infra* at 38-41. *See Smiley, supra,* at 470 (George, J., dissenting) (noting that it has been established since the early 1800's that even in the absence of a specific federal statutory prohibition a state may not discriminate against a federal instrumentality either in the enactment or enforcement of state laws). Thus, the most-favored-lender doctrine serves to eliminate discrimination without distorting or extending the meaning of interest to include charges that Congress neither expressly nor implicitly incorporated in the definition of interest.

III.

Defendant, as well as the dissent, cites a recently-promulgated proposed interpretive ruling by the Office of the Comptroller of the Currency (OCC), the agency charged with enforcement of the NBA, as evidence that late fees constitute interest for purposes of the NBA. *Post* at __ (slip op. at 16). The soundness of this ruling, and its value as authority, are greatly undermined when placed in the context of conflicting OCC rulings.

It is well settled that in general an agency's interpretation of a statute it is charged with enforcing is entitled to substantial deference, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 *U.S.* 837, 843-45, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 703-04 (1984); *EPA v. National Crushed Stone Ass'n*, 449 *U.S.* 64, 83, 101 *S. Ct.* 295, 307, 66 *L. Ed.* 2d 268, 283 (1980) (citing *Udall v. Tallman*, 380 *U.S. 1*, 16, 85 *S. Ct.* 792, 801, 13 *L. Ed.* 2d 616 (1965)), and must in general be upheld even if that interpretation is not the only permissible one or even the most reasonable. *Grocery Town Market, inc. v. United States*, 848 *F.*2d 392, 396 (3d Cir. 1988). There are, however, exceptions to the general rule.

Far less than the usual amount of deference to an agency interpretation is appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question. *INS v. Cardoza-Fonseca*, 480 *U.S.* 421, 446 n.30, 107 *S. Ct.* 1207, 1221 n.30, 94 *L. Ed* 2d 434, 457 n.30 (1987) (citing *Watt v. Alaska*, 451 *U.S.* 259, 273, 101 *S. Ct.* 1673, 1681, 68 *L. Ed.* 2d 80 (1981); *General Elec. Co. v. Gilbert*, 429 *U.S.* 125, 143, 97 *S. Ct.* 401, 411-12, 50 *L. Ed.* 2d 343 (1976)).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 *U.S.* (1 Cranch) 137, 177, 2 *L. Ed.* 60 (1803). Statutory construction is ultimately a judicial function. *See, e.g., SEC v. Sloan*, 436 *U.S.* 103, 118, 98 *S. Ct.* 1702, 1712, 56 *L. Ed.* 2d 148, 161 (1978); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 *U.S.* 726, 745-46, 93 *S. Ct.* 1773, 1784-85, 36 *L. Ed.* 2d 620, 633-34 (1973). Indeed, "one of the Judiciary's characteristic roles is to interpret statutes." *Japan Whaling Ass'n v. American Catacean Soc'y*, 478 *U.S.* 221, 230, 106 *S. Ct.* 2860, 2866, 92 *L. Ed.* 2d 166, 179 (1986). Accordingly, the Supreme Court in *Chevron, supra*, did not state that silence or ambiguity in a statute automatically requires a court to delegate its entire interpretive responsibility to an agency, especially when an agency's interpretation is contrary to the purpose of the statute or inconsistent. *See West v. Bowen*, 879 *F.*2d 1122, 1138 (3d Cir. 1989) (Mansmann, J., concurring and dissenting).

Courts have found consistency or lack thereof in an agency interpretation to be crucial in determining the degree

of deference to be afforded that interpretation. *See, e.g., INS v. Cardoza-Fonseca, supra* (rejecting deference to Board of Immigration Appeals due to years of inconsistent positions); *Director, Office of Workers' Compensation Programs v. Mangifest,* 826 *F.*2d 1318, 1319-20 (3d Cir. 1987) (finding "ambiguities and inconsistencies in the Director's interpretation of . . . regulations . . . sufficiently great to preclude deference"); *Revak v. National Mines Corp.,* 808 *F.*2d 996, 1002 (3d Cir. 1986) (rejecting deference arguments due to inconsistent agency interpretation of statute); *Disabled in Action v. Sykes,* 833 *F.*2d 1113, 1117-19 (3d Cir. 1987), *cert. denied,* 485 *U.S.* 989, 108 *S. Ct.* 1293, 99 *L. Ed.* 2d 503 (1988). There is a great difference between flexibility and vacillation. Accordingly, judicial deference to administrative rulings should be cast on a sliding scale whereby the usual respect for agency determination diminishes as apparent inconsistencies surmount. *West, supra,* 879 *F.*2d at 1134 (Mansmann, J., dissenting and concurring).

The federal administrative understanding of the meaning of "interest" has wavered. *Cf. Copeland, supra,* __ *Colo.* at__ (slip op. at 13) (asserting that "[t]he OCC *consistently* has taken the position that late payment fees are interest" under both section 85 of the NBA and section 521 of the DIDA) (emphasis added). An examination of OCC interpretive letters reveals significant inconsistent administrative treatment of interest with respect to the NBA. As early as 1964, the OCC, responding to an inquiry to define interest under the NBA, stated that "late payment fees . . . would not properly be characterized as interest." *See* Letter by James J. Saxon, Comptroller of the Currency (June 25, 1964), Brief of Petitioner-Defendant at Ex C. (No. 38,817). Then, in 1986, the OCC was asked specifically whether late fees were considered interest that could be exported under section 85. Letter by Charles F. Byrd, Assistant Director, Legal Advisory Service (May 5, 1986), 1986 *WL* 143937 (O.C.C.). The agency opined that section 85 looks to state law to determine the maximum permissible interest rate, but that federal law determines which charges are "material" to the rate determination. *Id.* at *1. Because courts had not determined whether late fees were material, the OCC refused to provide the answer. *Ibid.*

In 1988, however, the OCC issued Interpretive Letter No. 452, which addressed whether various fees charged by an out-of-state national bank to its credit cardholder in Iowa were material to the determination of the interest rate under Section 85. Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1968). The agency concluded that whether particular fees are material to the interest rate determination under section 85 depends on the laws of a national bank's home state. *Id.* at 78,065-66 (citing Interpretive Ruling 7.7310, 12 C.F.R. § 7.7310(a)).

The OCC recently has affirmed that position. *See* Letter by Peter Liebsman, Assistant Director, Bank Operations and Asset Division (February 26, 1993), 1993 *WL* 501557 at *2 (the "1993 OCC Letter"). However, because the State failed to define "materiality", the 1993 OCC Letter stated that "characteristics of either the loan or the borrower . . . [that are] an integral part of a bank's decision to establish the rate of interest that will be charged" typically are material. *Id.* at *3. Notably, the OCC opined that charges such as "late fees, nonsufficient check charges, cash advance fees and attorney fees appear not to determine the numerical rate of interest to be charged." *Id.* at *4. Because such fees have only an "indirect effect on interest rates in that they may affect the ultimate return on loan proceeds," the agency suggested that absent their inclusion in the home-state's definition of interest, they would not be material, and thus, would not be exportable. *See ibid.*

The conflicting interpretations, coupled with the logic expressed in the "materiality" standard, convince us that this Court should not forsake its own considered reasoning by relying on an equivocation. It is the responsibility of Congress to depart from the traditional understanding of interest and to express an intent to include non-numerical interest rates in its definition of "interest" under the NBA.

IV.

New Jersey's banking statutes also reflect the basic understanding that the notion of interest was conceived and contin-

ues to be defined as specific percentage rates, rather than discrete charges, such as late fees, which are not directly related to borrowing money. *N.J.S.A.* 17:13A, which governs installment loan rate advertising, defines interest as follows:

> every charge paid to the lender or contracted for by the lender and the borrower in connection with or as an incident of a loan, whether designated as interest or as a financial charge or otherwise, *except that the term does not include the following charges when made pursuant to law: late or delinquency charges;* attorneys' and collection fees; insurance premiums, including premiums for credit life insurance; recording or filing fees, and all other charges which may lawfully be made on loans in addition to interest or finance charges.
>
> *[N.J.S.A.* 17:13A-2(g) (emphasis added).]

Other statutes distinguish late fees from interest by either authorizing or prohibiting certain lending institutions from making such charges. *N.J.S.A.* 17:13-104b specifically authorizes New Jersey credit unions to charge late fees to its members.

> Notwithstanding the provisions of R.S. 31:1-1 to the contrary, a credit union may charge, contract for, and receive interest on loans at a rate or rates agreed to by the credit union and the member. A *credit union may charge late fees* and lawful fees paid to any public officer for filing, recording, or releasing a document, and may charge collection fees, not to exceed 20% of the principle balance and interest outstanding, which may be added to the principal balance of any loan placed for collection after default thereon.
>
> [*N.J.S.A.* 17:13-104b (emphasis added).]

N.J.S.A. 17:9A governs a banking institution's authority to make check loans and other loans, *N.J.S.A.* 17:9A-59.1 to -59.17, small business loans, *N.J.S.A.* 17:9A-59.25 to -59.39 and loans secured by a deposit, *N.J.S.A.* 17:9A-59.40-63. In defining the amount of interest permitted on each class of loans, the respective statutes specifically include only percentage *rate* interest, not other financial charges. Other charges are provided for in separate sections. For example, *N.J.S.A.* 17:9A-59.6, sets the rate of interest for advance loans. Later provi-

sions provide for additional fees on advance loans, such as late charges, *N.J.S.A.* 17:9A-59.7, and service charges, *N.J.S.A.* 17:9A-59.8.

On the other hand, New Jersey's RISA prohibits lenders from charging late fees and other financial charges in addition to interest. The statute provides:

> No retail seller, sales finance company, or holder shall charge, ... directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with ... retail charge accounts other than the charges permitted by this act ....
>
> [*N.J.S.A.* 17:16C-50.]

At the time this case was before the Court, the statute expressly authorized delinquency or late-payment charges on only retail installment contracts. *N.J.S.A.* 17:16C-42(a). On March 7 , 1995, however, the statute was amended by *L.* 1995, *c.* 43, ¶ 1, which specifically allows for late-payment charges on retail charge accounts. It provides in pertinent part that:

> The holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10 if provided for in the retail charge account agreement, on any minimum payment which has not been paid in full for a period of 10 days after its due date, as originally scheduled.
>
> [*L.* 1995, *c.* 43, § 1.]

The effective date of the amendment was May 29, 1995, 90 days following its enactment. *L.* 1995, *c.* 43, § 2. Thus, for purposes of this appeal, defendant's late-fee charges were still illegal under RISA. This amendment to the statute indicates, however, that the legislature did not intend to include late-fee charges within its definition of interest; rather, it expressly specified when and under what conditions other non-percentage rate charges could be procured by lenders in addition to annual interest rate charges.

Moreover, the regulations governing banking specifically provide for the maximum *rate* of interest to be charged on the issuance of different types of loans. *N.J.A.C.* 3:1-1.1; *N.J.A.C.*

3:1-1.2. These regulations governing interest say nothing about other financial charges, such as late fees. Thus, the manner in which both the Legislature and the Department of Banking have chosen to regulate lender-authorized charges clearly supports the conclusion that late fees are distinct from interest and thus not contained within the accepted definition of interest. The dissent incorporates late fees, and presumably other similar charges, into the notion of traditional interest by homogenizing what the Legislature has meticulously separated. It does so only by obscuring the clear language and structure of the legislative treatment of interest and late fees. *See Post* at __ (slip op. at 24-28).

The State Bank Parity Act, *N.J.S.A.* 17:13B-1 to -2, authorizes New Jersey banks to charge the same "rate of interest" charged by credit unions. *N.J.S.A.* 17:13B-2 provides:

> Notwithstanding any provisions of R.S. 31:1-1 or any other statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a *rate* of interest on any class or type of loan at the rate of interest permitted to any other lender by the laws of this State on that class or type of loan.
>
> [*N.J.S.A.* 17:13B-2 (emphasis added).]

The Assembly Banking and Insurance Committee Statement that accompanied this legislation indicates that the act was intended as a state-bank companion to section 85 of the NBA.

> This legislation would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy ... In practice, a national bank may charge interest on any type of loan at the highest rate allowed to any lender in the state making any similar type of loan. Thus, in certain cases, national banks may now use the rate permitted to be charged by secondary mortgage loan licensees, small loan companies (this rate will now apply to bank credit cards because of legislation passed last year), or home repair contractors. This legislation, therefore, provides parity to state-chartered institutions.

[Assembly Banking & Insurance Committee, *Statement to Assembly Bill No. 1986* (1981).]

Thus, while the Act provides for parity between the rates of interest charged by both banks and credit unions, the act does not explicitly authorize banks to charge other types of fees. Furthermore, there is no indication that the Legislature implicitly intended these other fees in the State Bank Parity Act. Indeed, the fact that the Legislature has passed separate statutes that expressly authorize the imposition of discrete fees and charges, (see discussion, *supra,* at __ (slip op. at 24-28)), in contrast to interest, underscores the understanding that those types of charges are not contemplated by the State Bank Parity Act. The clearest indication of the Legislature's intent to distinguish between interest rates and late fees is in the language of its recent amendment to RISA, in which it expressly authorizes holders of retail charge accounts, as well as retail installment contracts, to charge late fees. The Legislature obviously enacted this law because it wanted to enable banks and other retail charge-account holders to charge late fees that credit unions were permitted to charge under *N.J.S.A.* 17:13-104b. Had the State Bank Parity Act provided parity between lenders as to specific non-interest rate charges, there would have been no need for the amendment because holders of retail charge accounts would have been entitled, pursuant to the parity act, to charge the late fees that credit unions were authorized to charge. Courts should avoid a construction that would render legislative enactments meaningless. *State v. Reynolds,* 124 *N.J.* 559 (1991). Thus, by excluding discrete charges from the parity act, the Legislature retained flexibility with respect to the non-percentage rate fees different lenders were permitted to charge their customers. For example, retail charge account holders are limited to a $10 late-fee per default period, while credit unions have no such limitation.

The language of RISA itself indicates the legislative intent to leave room for subsequent legislative initiatives to allow different lenders to make discrete non-percentage rate charges; it states that a retail seller, sales finance company or holder cannot charge additional fees or charges "other than the charges permitted by this act." Thus, the Legislature, in

reserving within the statute the ability to authorize certain charges, has correctly recognized that there may be specific reasons for treating different lenders differently. For example, there may be specific reasons for allowing a credit union, rather than a bank, to charge late fees. Credit unions are small, individualized lenders which do not cater to a large market. Furthermore, credit unions have a genuine social welfare purpose. In assisting their members they cannot spread costs like banks. Thus, they must be permitted to take actions, such as charging late fees, to help insure their solvency.

The dissent points to a letter from the Department of Banking to support its theory that the State Bank Parity Act includes late fees in its definition of interest. *Post*, at __ (slip op. at 27-28) (citing Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994)). Relying on an informal and isolated expression of agency interpretation has limited authoritative weight and does little to buttress its argument. Here, we are not presented with duly promulgated regulations that express legislative intent. *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 331 (1984) (emphasizing that procedural requirements for passage of rules, involving notice and public participation, are given authoritative weight). Nor are we confronted with even a course of regulatory conduct that reflects a clear and consistent administrative understanding as evidence of an underlying legislative intent. *Body-Rite Repair Co., Inc. v. Director, Div. of Taxation*, 89 *N.J.* 540, 545-46 (1982) (holding that practical administrative construction of statute over period of years without interference by Legislature is evidence of conformity with legislative intent and should be given great weight by court). Clearly, a single letter from the Department of Banking does not constitute a settled or widespread course of administrative conduct that can be equated with the interpretive authority of a duly promulgated rule. Moreover, it cannot provide a meaning that is neither expressed in the statute, nor in the legislative scheme governing banking. Our deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a

statute any greater effect than is permitted by statutory language. *In re Adoption of N.J.A.C. 7:26B,* 128 *N.J.* 442, 450 (1992) (citation omitted).

This Court has found no legislative authority to support the contention that interest in the context of either the State Bank Parity Act or the NBA encompasses a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate. Thus, we can conclude only that neither Congress, in passing the NBA, nor the New Jersey Legislature, through its own parity act, intended to include late fees in its definition of interest for the purpose of preventing discrimination against out-of-state lenders.

V.

Defendant argues that although the new RISA amendment is inapplicable to the charges assessed in this case, the fact that New Jersey credit unions were permitted to charge late fees at the time defendant procured those fees, pursuant to the most-favored-lender doctrine, entitled out-of-state national banks, like defendant, to charge late fees. We disagree.

Although a national bank may "borrow" the interest rate from any lending institution in its home state, without regard to whether that institution is actually "competitive" with a national bank, a national bank is not authorized to charge late fees simply because a state credit union is so authorized in a state other than its home state. Inter-state parity, as established in *Marquette,* is commonly identified as the notion that a national bank is entitled to export the interest authorized by its home state to borrowers located in other states that authorize a lower interest rates. *Marquette, supra,* 439 *U.S.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. The defendant seeks to extend this inter-state parity notion by arguing that a foreign national bank lending to customers in New Jersey is entitled to charge the interest authorized by the state in which the bank is located *or* the interest authorized in New Jersey, whichever is higher, and that for purposes of determining what interest can be exported, all of the extra charges authorized by the borrower's state can be included as well. Thus, it argues a

foreign national bank can charge late fees because New Jersey credit unions are permitted to charge them and, under the most-favored-lender doctrine, national banks can charge the same interest — in its most expansive form — as any state lender. The argument, we find, overreaches the federal statutory scheme.

Section 85 of the NBA provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory, or District where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except where by the laws of any State a different rate is limited for banks organized under state laws, *the rate so limited shall be allowed for associations organized or existing in any such state* under this chapter.
>
> [12 U.S.C.A. § 85 (emphasis added).]

Section 86 reads in pertinent part:

> The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest . . . In case the greater rate of interest has been paid, the person by whom it has been paid, ... may recover back, . . . twice the amount of the interest thus paid . . . .
>
> [12 *U.S.C.A.* § 86.]

For purposes of section 85, a national bank is located either in the place designated in its organizational certificate or in the places in which it has established authorized branches. *Marquette, supra,* 439 *U.S.* at 309 n.21, 99 *S. Ct.* at 546 n-21, 58 *L. Ed.* 2d at 542-43 n.21. A plain reading of the statute and most cases interpreting it indicate that a national bank is permitted to charge the interest rate of the state in which it is located, *not* the interest rate of the state in which the out-of-state customer is located. *Id.* at 301, 99 *S. Ct.* at 542,

58 *L. Ed.* 2d at 537-38 (ruling that section 85 authorizes a national bank based in one state to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home state, when that rate is greater than that permitted by the state of the bank's nonresident customers); *Cades v. H & R Block, Inc.*, 43 F.3d 869, 874 (4th Cir. 1994) (determining that Delaware law applied to fix the interest rate when the bank located in Delaware, even though the loan occurred in South Carolina; "section 85, which looks to the interest rates allowed by the state where the bank is located — not where the borrower is located or where the loan transaction may be said to have occurred").

Moreover, there is some indication that it is illegal for a national bank to charge interest in excess of that amount permitted in its home state. In *Panos v. Smith, supra,* 116 F.2d 446, the court read sections 85 and 86 together to find that the NBA forbids a national bank to collect a higher rate of interest than is permitted by the law of the state in which it is located. Although none of these cases specifically dealt with a situation where the interest in the state of the customer was higher or more permissive than the national bank's home state, the basic understanding that resort to the higher level of interest would not be allowed is readily inferable from their treatment of the subject.

The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or using her "lender credit card" partakes in a transaction in the national lender's home state. *See Marquette, supra,* 439 *U.S.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (recognizing that impairment of state usury laws "has always been implicit in the structure of the National Bank Act, since citizens of one state were free to visit a neighboring state to receive credit at foreign interest rates"); *Schumacher v. Lawrence, supra,* 108 *F.2d* 576, 577 (6th Cir. 1940) (stating that the question whether the rate of interest charged by a national bank is usurious is decided according to the law of the state in which the transaction occurs); *Haas v. Pittsburgh Nat'l Bank,* 60 *F.R.D.* 604, 608 n. 3 (W.D.Pa. 1973) (same); *Fisher v. First Nat'l Bank, supra,* 548

*F.*2d at 257 ("A[n] [Iowa] customer using this "lender credit card" . . . communicates or indicates his intention to establish the credit card arrangement with BankAmericard when the lender, through banking channels, receives in the State of Nebraska the draft of the customer."). It is clear that Congress intended that the NBA and DIDA immunize national banks and out-of-state federally insured banks that lend money beyond their home-state's borders from local usury laws that might give local banks a competitive advantage. *E.g., Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64 (holding that Congress, by enacting NBA, intended to protect national banks from hostile state usury laws); *Sherman,* 272 *N.J. Super.* at 440 (same); *Hunter,* 272 *N.J. Super.* at 530 (same); 12 *U.S.C.A.* 1831d(a) (permitting State-chartered insured depository institutions to charge interest rates permitted in their home state "[i]n order to prevent discrimination against State-chartered insured depository institutions"). Thus, the statutes were intended to prohibit states from forcing national banks to charge a lower rate of interest to customers located outside of the national bank's home state than they would be permitted to charge their customers located in the home state.

We do not believe prohibiting national lenders from charging the rate of interest permitted by the laws of a foreign state would be considered discrimination when the national bank was not organized in that state and would not be able to charge higher interest rates except by taking advantage of the laws of the foreign state. New Jersey's RISA does not conflict with the most-favored-lender doctrine in this case, and thus New Jersey should be permitted to prohibit out-of-state lenders from charging late-fees to New Jersey residents, because, at the outset of this case, New Jersey banks were also prohibited from charging those fees. This finding would enable state usury laws to remain vital and controlling over non-interest rate credit terms. Consumer credit protection is a fundamental local interest, long recognized by Congress, and it thus should not be displaced by the sweeping preemption urged by defendant.

Because at the time of this appeal, RISA prohibited both New Jersey and national retail charge account holders from

charging late fees, we hold that defendant's late-fee charges violated this state's usury laws and are thus impermissible.

VI.

Although the late-fee charges at issue in this case are impermissible under the RISA statute as it existed when those fees were assessed, we acknowledge, as suggested by the parties, that such charges assessed after May 29, 1995 do not appear to be illegal under that statute. As earlier discussed, *supra* at __ (slip op. at 28-29), the Legislature amended the statute to permit "the holder of any retail charge account [to] collect a delinquency or collection charge" of no more than $10. *L.* 1995, c. 43, § 1. Pursuant to the statute, a "holder" is "any person, including a retail seller, who is entitled to the rights of a seller under a retail installment contract or retail charge account." *N.J.S.A.* 17:16C-1(m). A "retail charge account" is

> any account ... established by agreement which prescribes the terms under which a retail buyer may from time to time purchase or lease goods or services which are primarily for personal, family or household purposes, and under which the unpaid balance thereunder, whenever incurred is payable in one or more installments and under which a time price differential may be added in each billing period as provided herein. Retail charge account also includes all accounts arising out of the utilization by the holder of a credit card ... issued by a sales finance company, giving the holder the privilege of using the credit card ... to become a retail buyer in transactions out of which debt arises.
>
> [*N.J.S.A.* 17:16C-1(r).]

Although the statute does not expressly include banks within these definitions, clearly banks have for years been performing the functions attributable to holders of retail charge accounts. *See N.J.S.A.* 17:3B-4 to -28 (Market Rate Consumer Loan Act) (authorizing New Jersey banks to offer revolving credit plans at an interest rate agreed to by lender and borrower); *N.J.S.A.* 17:9A-59.1 (permitting advance loans by banks). In fact, the statute expressly provides that "any banking institutions authorized to do business in this State, shall be autho-

rized to transact business as a sales finance company." *N.J.S.A.* 17:16C-2. Thus, it appears that the Legislature intended to include banks that issue credit cards within those institutions authorized to assess late charges on overdue charge accounts. Therefore, a bank may contract to charge the delinquency fee on the same basis as any other "holder of any retail charge account" in New Jersey.

Nothing in the statute indicates a legislative intention to allow state banks to charge delinquency fees while prohibiting national banks and federally-insured state banks from assessing those fees. In fact, the statute defines banking institutions generally as "any bank, national banking association, savings bank or federally chartered savings bank authorized to do business in this State". *N.J.S.A.* 17:16C-l(n). There is no distinction between a national banking association and an association under state laws except where the distinction is specifically made by Congress. *Anderson v. First Nat'l Bank,* 54 *F. Supp.* 937 (D. Idaho 1944). States may not discriminate against national banks with respect to general contract terms or charges. *See Anderson Nat'l Bank v. Luckett,* 321 *U.S.* 233 (1944) (national banks are subject to state laws unless those laws infringe upon national banking laws or impose undue burden on performance of bank's functions); *National State Bank v. Long,* 630 *F.*2d 981, 985 (3d Cir. 1980). Thus, national banks, as well as federally-insured state banks, are permitted to charge the late fees authorized by statute to the same extent as state banks.

However, New Jersey retains the authority to regulate on a non-discriminatory basis all non-interest rate contractual terms and conditions of a bank as a holder of a retail charge account. The Supreme Court has held that state law controls a bank's right to collect its debts.

> [National banks] are governed in their daily course of business far more by the laws of the State than of a nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when

> the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.
>
> (*National Bank v. Commonwealth*, 6 *U.S.* (9 Wall) 353, 362, 19 *L. Ed.* 70 (1870).]

Thus, it would appear that a national bank and a federally-insured state bank may, as of May 29, 1995, charge a delinquency fee in accordance with the authorization now given by the statute. *See L.* 1995, *c.* 43.

VII.

The judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Stein and Coleman join in Justice Handler's opinion. Justice Pollock has filed a separate dissenting opinion in which Justice Garibaldi joins. Justice O'Hern has also filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Defendant-Respondent.

POLLOCK, J., dissenting.

This appeal poses the question whether a national bank located in South Dakota may impose a late charge on a credit-card customer who resides in New Jersey, if South Dakota permits the charge, but New Jersey does not. More specifically, the appeal focuses on whether the definition of "interest" in the National Bank Act (NBA), 12 *U.S.C.A.* § 85 (section 85), includes late charges, and, if so, whether that statute preempts the New Jersey Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-1 to -94 (RISA).

In a class-action complaint brought on behalf of himself and other Citibank credit cardholders, petitioner, Marc Sherman, asserts that the RISA precludes defendant, Citibank (South Dakota), N.A. (Citibank), a national banking association located in South Dakota, from imposing late charges on cardholders located in New Jersey. The Law Division granted Citibank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super.* 435. The majority reverses. I dissent.

I.

Because the appeal arises from the grant of Citibank's motion to dismiss, I accept as true all facts alleged in the complaint. *See Bozza v. Vornado, Inc.*, 42 *N.J.* 355, 35.7-58 (1964). Sherman alleges that in 1989 Citibank sent to him at his New Jersey residence an application, Visa card, and Card Member Agreement. The record, however, does not include copies of these instruments. According to the complaint, the annual

percentage-rate finance charge (periodic interest) is 19.8 percent. In addition, a cardholder who does not make the minimum payment within twenty-five days of the due date is subject to a fixed late-payment fee regardless of the amount of the outstanding balance or delinquent payment. Twice Sherman was late in making his monthly payment. Each time, Citibank imposed a late charge.

Sherman claims that the late charges violate various provisions of New Jersey's Consumer Fraud Act, *N.J.S.A.* 56:8-2 and -19, and of the RISA, *N.J.S.A.* 17:16C-50 and -54. The Fraud Act prohibits undisclosed late charges, and the RISA prohibits delinquency charges on revolving credit accounts. He also claims that the late fees constitute a common-law breach of contract and conversion. All claims depend on whether Citibank may impose late charges as interest.

The initial task is to determine the meaning of "interest" in section 85. That section permits national banks to charge borrowers "interest at the rate allowed by the laws of the State ... where the bank is located." 12 *U.S.C.A.* § 85. South Dakota, the state where Citibank is located, defines "interest" to include late charges: "Interest is the compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation ... charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit." *S.D. Codified Laws Ann.* § 54-3-1 (1995). Citibank claims that as a South Dakota bank it may impose late charges on defaulting customers whether those customers are located in South Dakota, New Jersey, or anywhere else.

Sherman, however, relies on the RISA, which permits credit-card issuers to charge periodic interest, but not late fees: "No retail seller, sales finance company, or holder shall charge, ... directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with ... retail charge accounts..." *N.J.S.A.* 17:16C-50. He

claims that "interest" in section 85 refers to periodic interest, but not to late charges. Consequently, he denies that the RISA conflicts with the NBA.

II.

Initially dividing the majority and the dissent is the meaning of the word "interest" as used in the NBA. Both agree that "interest" includes periodic interest, the amount paid for the use of money calculated as a percentage of the sum due for a stated period, typically one year. That definition, however, is not exhaustive. The meaning of the word becomes indeterminate at the margins. Webster's Dictionary, for example, accords "interest" seven definitions, six with subparts. Definition 3(a) defines "interest" as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed paid in one year . . . ." *Webster's Third New International Dictionary* (1976). The use of the adverb "generally" suggests the existence of other definitions. So construed, accepted usage recognizes that "interest" may include charges other than periodic interest. Consistent with that construction, the Supreme Court of California recently concluded that dictionary definitions of "interest" "then current in American legal usage" at the time of the passage of the NBA are broad enough to include late charges. *Smiley v. Citibank (South Dakota) N.A.*, 44 *Cal. Rptr.* 2d 441, 450-51 (1995).

More relevant than the meaning that lexicographers assign to statutory terms is the meaning assigned by the Legislature. To bridge the gap between dictionary definitions and legislative intent, the California Supreme Court apparently assumed that Congress consulted the dictionaries cited in *Smiley*. Dictionaries, however, are not essential to the judicial search for the meaning of statutory terms. *Cabnell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). To illustrate, when deciding that "interest" in the NBA includes late charges, the Colorado Supreme Court recently concluded "that the common dictionary definitions are not sufficiently precise to settle the question before us." *Copeland v. MBNA America, N.A.*, ___ *Colo.* ___ (1995) (slip op. at 9).

Absent an express statutory definition, courts may glean the meaning of legislative language from sources such as statutory history, purpose, and structure. In ascertaining the meaning of a statutory term, a court's task is not to create its own definition, but to ascertain the definition intended by the Legislature. *E.g., Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n,* 499 *U.S.* 117, 128, 111 *S. Ct.* 1156, 1163, 113 *L. Ed.* 2d 95, 106-07 (1991); *Roig v. Kelsey,* 135 *N.J.* 500, 515 (1994). The NBA does not expressly define "interest." Nor does a fair reading of the legislative history of the statute disclose the intended meaning of that term. Accordingly, I search elsewhere for the word's meaning in the NBA.

The early history of national banking sheds some light on congressional intent in the NBA. Before enacting the NBA, Congress twice had tried unsuccessfully to create a Bank of the United States. Each time, however, states'-rights advocates defeated attempts to renew the Bank's charter. *See* John J. Knox, *A History of Banking in the United States* 35-48, 51-71 (1900) (discussing creation and dissolution of Bank of the United States and Second Bank of the United States); Bray Hammond, *Banks and Politics in America* 197-226, 369-450 (1957) (same). Then, in 1864, responding to the economic turmoil created by the Civil War, Congress adopted the NBA. Among other things, the NBA re-established a system of national banks. *See* Knox, *supra,* at 91-111 (discussing NBA); Hammond, *supra,* at 718-34 (same). To overcome local prejudice in favor of state banks, Congress included section 85. By mandating interest-rate parity in section 85, Congress sought to provide a level playing field for national banks throughout the United States. *See* Knox, *supra,* at 235-69. Although helpful, the history of the NBA is not dispositive of the meaning of interest in the NBA. *Copeland, supra,* ____ *Colo.* at ____ (slip op. at 10).

The United States Supreme Court first construed section 85 in *Tiffany v. National Bank of Missouri,* 85 *U.S.* (18 Wall.) 409, 21 *L. Ed.* 862 (1873). The plaintiff, Tiffany, challenged the legality of the ten-percent interest rate charged to Missouri borrowers by the defendant, National Bank of Missouri. Missouri's usury laws limited to eight percent the interest rate that

state-chartered banks could charge, but allowed non-bank lenders to charge interest at a rate of ten percent. *Id.* at 411, 21 *L. Ed.* at 863. Reasoning that section 85 permitted the defendant national bank to charge interest at a "rate allowed by the laws of [Missouri]", the Court held that the bank could charge the highest interest rate that could be charged by any lender in that state. *Id.* at 411-13, 21 *L. Ed.* at 863-64. In so holding, the Court required states to treat national banks as a "most favored lender." *Id.* at 413, 21 *L.Ed.* at 864. Although the Court acknowledged that its holding might disadvantage state-chartered banks, it relied on the overriding congressional intent to create a strong national banking system immune from unfriendly state legislation. *Id.* at 412-13, 21 *L. Ed.* at 863-64. "National banks," the Court declared, are "national favorites." *Id.* at 413, 21 *L. Ed.* at 864.

Over a century later, the Court revisited section 85 in *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978). The plaintiff, Marquette National Bank of Minnesota (Marquette), challenged the interest rate charged by a Nebraska national bank to Minnesota credit cardholders. Minnesota law prohibited banks in that state from charging more than twelve percent on credit-card balances, but allowed them to charge an annual fee up to $15. *Id.* at 302-03, 99 *S. Ct.* at 542-43, 58 *L. Ed.* 2d at 538. Nebraska law, however, allowed banks to charge up to eighteen percent on outstanding credit-card balances below $1,000. *Id.* at 302, 99 *S. Ct.* at 542, 58 *L. Ed.* 2d at 538. First National Bank of Omaha (Omaha Bank), a national bank chartered in Nebraska, charged eighteen percent interest on outstanding balances of Minnesota credit cardholders. *See id.* at 304, 99 *S. Ct.* at 543, 58 *L. Ed.* 2d at 539. Marquette claimed it was losing customers to Omaha Bank because "Marquette was forced by the low rate of interest permissible under Minnesota law to charge a $10 annual fee for the use of its credit cards." *Ibid.*

The Court determined that although the cardholders lived and made credit-card purchases in Minnesota, Omaha Bank was "located" in Nebraska. *Id.* at 310-13, 99 *S. Ct.* at 546-48, 58 *L. Ed.* 2d at 543-45. Consequently, Omaha Bank

could charge the favorable Nebraska rate to its customers in Minnesota. *Id.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. As in *Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64, the Court noted the clear congressional intent to favor national banks, even at the expense of state banks. *Marquette Nat'l Bank, supra,* 439 *U.S.* at 314-18, 99 *S. Ct.* at 548-50, 58 *L. Ed.* 2d at 545-48.

Although *Tiffany* and *Marquette* discussed permissible rates of interest under section 85, they did not define "interest." Recent federal decisions, however, illuminate the meaning of interest in section 85. *See Greenwood Trust Co. v. Massachusetts,* 971 *F.* 2d 818 (1st Cir. 1992), *cert. denied,* ____ *U.S.* ____, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993) ; *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992).

Greenwood Trust involved a federally-insured state bank chartered in Delaware that issued credit cards throughout the United States, including Massachusetts. 971 *F.* 2d at 821. The bank, Greenwood Trust Company, imposed late charges on its delinquent credit-card customers. Delaware law, like South Dakota law, characterizes late charges as "interest." *Id.* at 829. The state claimed that Massachusetts' consumer-protection law, like the RISA, prohibited late charges. *Id.* at 821. Greenwood Trust argued, however, that by reference to the law of Delaware, the Depositary Institutions Deregulation and Monetary Control Act of 1980 (DIDA) authorized it to charge late fees as interest.

Section 521 of the DIDA grants the same protection to federally-insured state banks that section 85 of the NBA provides to national banks. Section 521 provides that any federally-insured state bank may,

> notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the

> Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The United States Court of Appeals for the First Circuit ruled that under section 521 Greenwood Trust could charge its Massachusetts cardholders the highest interest rate allowed by Delaware law. *Greenwood Trust, supra,* 971 *F.* 2d at 827. The court determined that both Delaware's express statutory provision, *Del. Code Ann.* tit. 5, § 950 (1994), and federal common law support a broad definition of "interest" that includes late fees. 971 *F.* 2d at 829-30 (citing *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.* 2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank,* 548 *F.* 2d 255, 258-61 (8th Cir. 1977) (cash-advance fee); *Panos v. Smith,* 116 *F.* 2d 445, 446-47 (6th Cir. 1940) (mortgage, taxes, and recording fees); *Cronkleton v. Hall,* 66 *F.* 2d 384, 387 (8th Cir.) (bonus or commission), *cert. denied,* 290 *U.S.* 685, 54 *S. Ct.* 121, 78 *L. Ed.* 590 (1933); *Nelson v. Citibank (South Dakota) N.A.,* 794 *F. Supp.* 312, 318 (D. Minn. 1992) (late fees)). Thus, the court concluded that for purposes of section 521, "interest" includes late fees, and that Greenwood Trust could "export" those charges authorized by Delaware law to Massachusetts. *Greenwood Trust, supra,* 971 *F.* 2d at 831.

The vast majority of state and federal courts have followed *Greenwood Trust. E.g., Ament v. PNC Nat'l Bank,* 849 *F. Supp.* 1015 (W.D. Pa. 1994); *Watson v. First Union Nat'l Bank,* 837 *F. Supp.* 146 (D.S.C. 1993); *Goehl v. Mellon Bank,* 825 *F. Supp.* 1239 (E.D. Pa. 1993); *Smiley, supra,* 44 *Cal. Rptr.* 2d at 453; *Stoorman v. Greenwood Trust Co.,* 888 *P.* 2d 289 (Colo. Ct. App.), *rehearing denied,* ____ *Colo. Ct. App.* ____ (1994), *cert. granted,* ____ *Colo.* ____ (1995); *Copeland, supra,* ____ *Colo.* ____; *Sherman, supra,* 272 *N.J. Super.* 435; *Hunter v. Greenwood Trust Co.,* 272 *N.J. Super.* 526 (App. Div. 1994).

Tikkanen, supra, 801 *F. Supp.* 270, reached the same conclusion under section 85 as *Greenwood Trust* had reached

under section 521. In *Tikkanen,* which is virtually identical to this appeal, the plaintiff argued that section 85's definition of interest was restricted to numerical periodic interest rates and did not include late-payment charges authorized by South Dakota, the defendant national bank's home state. 801 *F. Supp.* at 277. The federal district court held, however, that interest under section 85 was not limited to percentage-rate charges and could include fixed late fees. *Id.* at 276-78. Although the court did not announce a federal definition of interest that included late fees, it held that if a national bank's home state defines interest to include such fees, then the bank may "export" those fees under section 85. *Id.* at 279.

Rejecting the *Greenwood Trust* and *Tikkanen* line of cases, lower courts in Pennsylvania have held that "interest" does not include late-payment fees. *Mazaika v. Bank one, Columbus, N.A.,* 653 *A.* 2d 640 (Pa. Super. 1994), *appeal granted,* 659 *A.* 2d 557 (Pa. 1995); *Gadon v. Chase Manhattan Bank,* 653 *A.* 2d 697 (Pa. Super. 1995) (following *Mazaika*). One United States District Court has reached a similar conclusion. *Copeland v. MBNA America, N.A.,* 820 *F. Supp.* 537 (D. Colo. 1993) (denying federal jurisdiction based on complete preemption defense because "ordinary meaning" of interest does not encompass late fees).

In *Mazaika, supra,* 653 *A.* 2d at 646, a Pennsylvania intermediate appellate court stated that "[i]t would appear beyond peradventure that the plain and ordinary meaning of the term 'interest' or 'interest rate' does not include late fees, . . . or the like which are not levied on a percentage basis." I find, however, that the meaning of "interest" and "rate of interest" are not as plain as the *Mazaika* court found them. As the OCC has concluded, *infra* at 16-17, interest could include all charges for the "use or forbearance of money," including late fees. *See Brown v. Hiatts,* 82 *U.S.* (15 Wall.) 177, 185, 21 *L. Ed.* 128, 131 (1872).

III.

The modern history of banking has been one of expanding regulation. Banks are subject to regulation by multiple

federal agencies. The Comptroller of the Currency, 12 *U.S.C.A.* § 1; the Federal Housing Finance Board, 12 *U.S.C.A.* § 422a; the National Credit Union Administration, 12 *U.S.C.A.* § 1752a; the Federal Deposit Insurance Company, 12 *U.S.C.A.* § 1811; the office of Thrift Supervision, 12 *U.S.C.A.* § 1462a; and the Board of Governors of the Federal Reserve System, 12 *U.S.C.A.* § 248, all regulate various aspects of banking. In addition, banks often are subject to dual regulation by state banking authorities.

With banking, as with other heavily-regulated commercial activities, Congress has recognized that it cannot maintain an efficient regulatory system through constant recourse to the legislative process. *See* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.1 (3d ed. 1994) ("It is impossible to draft a statute with sufficient precision and foresight to resolve each of the hundreds of issues that are likely to arise during the life of the statute."); Cass R. Sunstein, *Law and Administration after Chevron,* 90 *Colum. L. Rev.* 2071, 2088 (1990) ("Congress is unable to amend every statute to account for . . . changes . . . ."). Consequently, it has authorized administrative agencies to implement specific congressional objectives. When Congress delegates authority to an administrative agency, the judicial role is not to pass on the wisdom of an agency's decision, but to assure that the agency has not abused its delegated authority. Davis & Pierce, *supra,* at § 3.3; Antonin Scalia, *Judicial Deference to Administrative, Interpretations of Law,* 1989 *Duke L.J.* 511, 516; Richard J. Pierce, Jr., *Chevron & Its Aftermath: Judicial Review of Agency interpretations of Statutory Provisions,* 41 *Vand. L. Rev.* 301, 307-08 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era,* 3 *Yale J. on Reg.* 283, 300-04 (1986).

Absent clear indicia of legislative intent, courts often look for guidance to the administrative agency entrusted with the regulation of matters covered by a statute. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 513 *U.S.* ____, ____, 115 *S. Ct.* 810, 813-14, 130 *L. Ed.* 2d 740, 748 (1995); *Chevron, U.S.A., Inc. v. NRDC,* 467 *U.S.* 837, 842-44, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 702-03 (1984); *Blum v. Bacon,* 457 *U.S.* 132, 141, 102 *S. Ct.* 2355, 2361, 72 *L. Ed.* 2d

728, 736 (1982); *Lammers v. Board of Educ.*, 134 *N.J.* 264, 274 (1993); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 327 (1984). In *Nationsbank of North Carolina, N.A., supra*, 513 *U.S.* at ____, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 747, the United States Supreme Court recently reiterated:

> " 'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.' " *Clarke v. Securities Industry Ass'n*, 479 *U.S.* 388, 403-404, 93 *L. Ed.* 2d 757, 107 *S. Ct.* 750, 771-72 (1987) (quoting *Investment Company Institute v. Camp*, 401 *U.S.* 617, 626-627, 28 *L. Ed.* 2d 367 91 *S. Ct.* 1091 (1971)).

In *Chevron*, the United States Supreme Court developed a two-part test for determining whether deference to an agency interpretation of a statute is appropriate. First, the statute that the agency purports to interpret must be unclear. 467 *U.S.* at 842-43, 104 *S. Ct.* at 2781-82, 81 *L. Ed.* 2d at 703. When Congress has not defined an important statutory term, courts fairly can presume that Congress intended the agency to provide a definition. *Id.* at 843-44, 104 *S. Ct.* at 2782, 81 *L. Ed.* 2d at 703; *see also* Davis & Pierce, *supra*, at § 3.3 (discussing *Chevron* and presumption of congressional delegation); Scalia, *supra*, at 516-17 (same).

In 1864, Congress may not have contemplated specifically that banks would issue credit cards or even that interest would include late fees. Even so, I believe that Congress intended to delegate to the OCC the authority to implement the goals of the NBA. Also likely, Congress intended that in meeting those goals the OCC would adapt to the changing needs of banks and their customers. That adaptation foreseeably includes administrative changes in the definition of "interest." In brief, I believe that federal banking regulators are in a better position than state courts to define the meaning of "interest" in the NBA. That conclusion, in my opinion, also represents

sound public policy. On a matter so essential to the national economy as the meaning of "interest" in federal banking legislation, the nation is better served by judicial deference to the judgment of Congress and the banking regulators.

The second part of the *Chevron* test directs courts to defer to reasonable agency interpretations. 467 *U.S.* at 844-45, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704; *see also* Davis & Pierce, *supra,* at § 3.3; Scalia, *supra* at 516-18. Implicit in the notion of reasonableness is discretion in choosing among alternatives. In defining "interest" to include late charges, the OCC has made a reasonable choice among possible definitions of interest. Of course, if Congress should disagree with the agency's interpretation, it retains the authority to redefine the term. *See, e.g., CFTC v. Schor,* 478 *U.S.* 833, 845-46, 106 *S. Ct.* 3245, 3254, 92 *L. Ed.* 2d 675, 689 (1986) (suggesting that Congress's failure to overrule agency supports conclusion that agency definition comports with congressional intent).

The OCC consistently has determined that late-payment and certain other non-periodic fees are interest for purposes of section 85 of the NBA. In a recent interpretive letter, the agency concluded that a federal definition of "interest" under section 85 includes late fees. Letter by Julie L. Williams, Chief Counsel (Feb. 17, 1995), 1995 *WL* 419824 (O.C.C.). Earlier letters, although relying on the law of the national bank's home state, reached the same conclusion. *See* Letter by William P. Bowden, Jr. , Chief Counsel (Feb. 4, 1992), 1992 *WL* 136390 (O.C.C.) at *9-*11 (concluding that state law determines fees material to definition of interest) (the Bowden Letter); Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency (1988-89 Transfer Binder] *Fed. Banking L. Rep.* (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1988) (same) (the Serino Letter); Letter by Charles F. Byrd, Assistant Director, Legal Advisory Services (May 5, 1986), 1986 *WL* 143937 (O.C.C.) at *3 (concluding that state law determines maximum interest rate). *But see* Letter from Peter Liebesman, Assistant Director, Bank Operations and Assets Division (Feb. 26, 1993), 1993 *WL* 501557 (O.C.C.) at *9 (suggesting in *dicta* that late fees are not material to definition of interest absent state law conclusion to contrary). In

sum, the OCC consistently has concluded that if a state allows any lender to charge interest in the form of late-payment fees, a national bank located in that state may charge those fees to its out-of-state borrowers.

To confirm that interest, for purposes of the NBA, includes late fees, the OCC recently promulgated proposed Interpretive Ruling § 7.4001 for inclusion in the Code of Federal Regulations. 60 *Fed. Reg.* 11924, 11940 (1995) (to be codified at 12 *C.F.R.* 7.4001) (proposed March 3, 1995). The proposed ruling states:

> The word "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for any extension of credit, the making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, ... numerical periodic rates, late fees, not sufficient funds fees, overlimit fees, annual fees, cash advance fees, and membership fees.

If adopted, the proposed ruling would further evidence the OCC's conviction that late fees are interest. The majority's cavalier dismissal of the proposed ruling, *ante* at ____ (slip op. at 22), fails to consider the ruling's significance.

The agency's definition of "interest," as expressed in its interpretive letters, is clear. The judicial task is to determine whether that interpretation is reasonable. *Nationsbank, supra,* 513 *U.S.* at ____, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 748; *Chevron, supra,* 467 *U.S.* at 843-44, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704. In its February 17, 1995, interpretive letter, *supra,* the OCC documented early federal case law that defined "interest" as the "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention." *Brown, supra,* 82 *U.S.* (15 *Wall.*) at 185, 21 *L. Ed.* at 131. The letter then concludes that late-payment fees, which legitimately compensate lenders for increased lending costs and risks associated with delinquent borrowers, are interest.

The OCC's conclusion is reasonable. It permits a national bank to charge any fees related to the use of money, if those

charges are authorized by the bank's home state. That concept of parity comports with the NBA's goal of preventing discrimination against national banks. No principled reason confines the NBA to periodic interest rates.

Contrary to the protestations of the majority, *ante* at ____ (slip op. at 22-26), the evolution of the OCC's analysis does not render its opinion unworthy of judicial deference. *Chevron* counsels that an agency's change in a policy determination is not necessarily entitled to less respect because of the change. *See* 467 *U.S.* at 863-64, 104 *S. Ct.* at 2792, 81 *L. Ed.* 2d at 715-16; Scalia, *supra,* at 517-19 (discussing *Chevron's* rejection of consistency requirement); Starr, *supra,* at 297-98 (same). Although the agency's analysis may have evolved over time, the analytical path has consistently led to the conclusion that national banks may export late fees. Late charges, moreover, are sufficiently close to the essence of "interest" to justify the OCC's decision to include them within the meaning of the word. The prototypical definition of "interest" as periodic interest is broad enough to encompass late charges. *See generally* Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?,* 73 *Wash. U. L.Q.* 1069 (1995) (discussing definitional and prototypical interpretations of statutory language). I accept the conclusion of the banking regulators that interest for purposes of the NBA may include late charges and other fees charged by lenders in connection with a loan.

IV.

A.

Having determined that section 85's definition of "interest" includes late fees, the next question is whether that definition preempts the RISA's prohibition against the imposition of such fees. More specifically, the question is whether Congress intended that the NBA, as interpreted by the OCC, should preempt state law.

Congress may preempt a state law by expressly stating that it so intends, *e.g., Cipollone v. Liggett Group, Inc.,* 505 *U.S.* 504, ____, 112 *S. Ct.* 2608, 2617, 120 *L. Ed.* 2d 407, 422-23

(1992); by occupying an entire field of regulation, *e.g., Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S. Ct.* 1146, 1152, 91 *L. Ed.* 1447, 1459 (1947); or by enacting a federal statute that conflicts with a state law, *Hillsborough County, supra,* 471 *U.S.* at 713, 105 *S. Ct.* at 2375, 85 *L. Ed.* 2d at 721; *Maryland v. Louisiana,* 451 *U.S.* 725, 747, 101 *S. Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 596 (1981).

Section 85 does not contain an express preemption clause. Given the dual regulation of banking by state and federal regulators, Congress may not have occupied completely the field of banking regulation. The question becomes whether section 85's definition of "interest," which permits national banks to impose late fees, conflicts with the RISA's prohibition of such fees.

My analysis begins with the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> [*U.S. Const., art.* VI, *cl.* 2.]

Ever since *Gibbons v. Ogden,* the Supremacy Clause has mandated preemption of state laws that "interfere with, or are contrary to the laws of Congress . . . ." 22 *U.S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Notwithstanding the supremacy of federal law, the United States Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 *U.S.*____, ____, 115 *S. Ct.* 1671, 1676, 131 *L. Ed.* 2d 695, 704 (1995); *see Maryland, supra,* 451 *U.S.* at 747, 101 *S. Ct.* at 2129, 68 *L. Ed.* 2d at 595; *Rice, supra,* 331 *U.S.* at 230, 67 *S. Ct.* at 1152, 91 *L. Ed.* at 1459. The Court, however, has found conflict to be preemptive when "compli-

ance with both federal and state [laws] is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 *U.S.* 132, 142-43, 83 *S. Ct.* 1210, 1217-18, 10 *L. Ed.* 2d 248, 257 (1963). It likewise has recognized preemption of state law when that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 *U.S.* 52, 67, 61 *S. Ct.* 399, 404, 85 *L. Ed.* 581, 587 (1941). Preemption is not foreclosed, however, merely because a federal statute displaces a traditional subject of state regulation. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta,* 458 *U.S.* 141, 153, 102 *S. Ct.* 3014, 3022, 73 *L. Ed.* 2d 664, 675 (1982); *Greenwood Trust, supra,* 971 *F.* 2d at 828. To constrict unduly a federal statute to avoid interference with a state law would subvert the Supremacy Clause.

Against that background, the question recurs whether section 85, which permits a national bank to impose a late fee, and the RISA, which prohibits such a fee, are in conflict. In one sense, to state the question is to answer it. When state law prohibits an act that federal law permits, the conflict is apparent. True, section 85 does not mandate that national banks must charge late fees. The problem arises only when the national bank seeks to impose a late fee. By foregoing late fees, Citibank could avoid the conflict. That analysis, however, begs the question.

As with ascertaining the meaning of "interest," I find guidance on the question of preemption in the rulings of the OCC. In her February 17, 1995, letter, *supra,* OCC Chief Counsel Julie Williams ruled:

> [W]e reaffirm our previous conclusion that "interest" permitted under section 85 may be charged without reference to whether all or part of it is permissible under the laws of the state where the customer resides. If the law of the state where the customer resides is different from the law of the state in which the bank is located, the former law has no effect on what the bank may charge as "interest."

Accord the Bowden Letter, *supra;* the Serino Letter, *supra; see also* Letter by Douglas H. Jones, Deputy General Counsel,

FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730-31 (July 8, 1992) (reaching same conclusion under section 521); Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 93-27, *Fed. Banking L. Rep.* (CCH) ¶ 81,635 at 55,838-39 (July 12, 1993) (same).

Admittedly, an agency statement according a preemptive effect to a statute is not as persuasive as an express statutory clause. Given the pervasive role that Congress has entrusted to federal banking regulators, however, I would respect consistent regulatory rulings on preemption. *City of New York v. FCC*, 486 *U.S.* 57, 64, 108 *S. Ct.* 1637, 1642, 100 *L. Ed.* 2d 48, 57 (1988) ("[I]f the agency's choice to preempt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care . . . , we should not disturb it unless it appears . . . that the accommodation is not one that Congress would have sanctioned.' ") (quoting *U.S. v. Shimer*, 367 *U.S.* 374, 383, 81 *S. Ct.* 1554 , 1560 , 6 *L. Ed.* 2d 908 , 915 (1961)).

Federal supremacy in the regulation of credit-card interest charges also makes sense. In many respects, credit cards have replaced the national currency. Residents of one state regularly make credit-card purchases from mail-order retailers in other states. Similarly, they use credit cards to charge meals, lodging, transportation, and other expenses when traveling throughout the nation and the world. Credit cardholders, moreover, can change their state of residence. Given the mobility of credit cardholders and transactions, federal regulation incorporating a bank's home-state's law is reasonable. The majority recognizes as much. It writes: "The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or using her 'lender credit card' partakes in a transaction in the national lender's home state. *Ante* at ____ (slip op. at 37).

B.

Close analysis of New Jersey law, moreover, reveals that the RISA impermissibly interferes with the congressional goal

of preventing states from discriminating against national banks. *Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64. Although the RISA prohibits certain lenders from imposing late fees on delinquent borrowers, various statutory provisions expressly authorize other lenders to charge such fees. For example, *N.J.S.A.* 17:13-104b expressly authorizes credit unions to charge late fees: "A credit union may charge late fees ... not to exceed 20% of the principal balance and interest outstanding ...." Similarly, *N.J.S.A.* 17:16C-42(b), *L.* 1995, *c.* 43, § 1, as recently amended, provides that "[t]he holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10 ...." Moreover, *N.J.S.A.* 17:9A-59.7 authorizes banks to charge late fees on advance loans. Thus, some New Jersey lenders are authorized expressly to charge late fees.

In 1981, the New Jersey Legislature enacted the State Bank Parity Act (the Parity Act), *N.J.S.A.* 17:13B-1 to -2, which is modelled after section 85. The Parity Act provides: "Notwithstanding any ... statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a rate of interest ... permitted to any other lender by the laws of this State ... *N.J.S.A.* 17:13B-2.

If late fees are interest under the Parity Act, then any New Jersey bank may charge them. On that premise, the RISA would prohibit only national and out-of-state banks, such as Citibank, from charging late fees. That result would discriminate against out-of-state national banks that lend money to New Jersey borrowers. A state law that discriminates against out-of-state national banks conflicts directly with Congress's goals, and, therefore, is preempted.

The possibility of that conflict raises the question whether late fees are "interest" for purposes of the Parity Act. Title 17, which governs financial institutions, does not expressly define the term. The relevant New Jersey statutes send inconsistent signals on the question whether the definition of interest excludes late fees. For example, *N.J.S.A.* 17:13-104(b), the same provision that authorizes credit unions to charge late fees, also authorizes credit unions to charge interest. Similarly, holders of retail charge accounts may charge interest under

N.J.S.A. 17:16C-40 and late fees under *N.J.S.A.* 17:16C-42. Furthermore, *N.J.S.A.* 17:9A-59.6 discusses interest rates on advance loans, and *N.J.S.A.* 17:9A-59.7 authorizes late fees on those loans.

Although New Jersey statutes apparently distinguish annual interest and late fees, I cannot ignore the Legislature's unequivocal statement that it enacted the Parity Act as a corollary to section 85. The Assembly Banking and Insurance Committee Statement that accompanied the Parity Act declared that the Act

> would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy. By the provision of 12 *U.S.C.* 85, national banks may take interest at the rate allowed by the laws of any state .... The [OCC], who supervises national banks, has interpreted this to mean that national banks may charge interest not only at the rate permitted by state law to banking institutions, but also at the rate for a similar type of loan made by any licensed lender. ... This legislation, therefore, provides [similar] parity to state-chartered institutions.

In the Parity Act, the Legislature intended to grant state banking institutions the same benefits that national banks enjoy under the NBA, as construed by the OCC. Under the Parity Act, therefore, state banks, like national banks, may charge late fees as interest.

The New Jersey Department of Banking has concluded that because late fees are interest under the NBA, they are interest for the purposes of the Parity Act. *See* Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994). Although informally expressed, the assistant commissioner's letter is the department's only expression of its understanding of the meaning of interest in the Parity Act. Both the state and federal legislative schemes rely on regulation by administrative agencies. Because the Legislature has entrusted the department with the regulation of state

banks, the department's interpretations of state banking laws are entitled to judicial deference. *Lammers, supra,* 134 *N.J.* at 274.

Admittedly, the Legislature has not drawn distinct lines; it could have expressed its intent more definitively. We are remitted to finding the Legislature's intent in a statutory mosaic. The majority sees one picture. I see another.

I conclude that the definition of interest in the Parity Act includes late fees. Under the Parity Act, because credit unions and retailers may charge late fees, "any bank, savings bank, [or] savings and loan association" chartered in New Jersey also may charge such fees.

Because state-chartered banks may charge late fees to New Jersey customers, a state law, such as the RISA, that prohibits out-of-state national banks from charging such fees would constitute impermissible discrimination in violation of the Supremacy Clause. In sum, I would hold that the NBA conflicts with, and thus preempts, the RISA.

V.

Interestingly, the majority concludes that in the future out-of-state national banks may impose limited late-payment fees on New Jersey cardholders. The Court so concludes because the 1995 amendment to *N.J.S.A.* 17:16C-42, *L.* 1995, *c.* 43, § 1, extends the right to charge late fees of up to $10 to holders of retail charge accounts. For me, however, the source of a national bank's authority to impose late fees is not the RISA, but the NBA. By declaring that the RISA determines the amount of the late fee that a national bank may charge, the majority has inverted the Supremacy Clause so that state law trumps federal law. The need for uniform regulation of national banks, not misplaced notions of federalism, should prevail.

Ultimately dividing the majority and dissent are differing perceptions of the roles of Congress, federal banking regulators, and state courts in regulating national banks. The majority takes a position reminiscent of states'-rights advocates who opposed federal regulation of interstate commerce and of

national banks. Banking, however, is integral to the national economy. Credit cards and other innovations such as electronic money transfers have converted consumer lending from a local to a national activity. In that context, the need for federal control is paramount. Until such time as Congress explicitly determines whether interest includes late charges, I would defer to the judgment of the OCC.

VI.

My colleague, Justice O'Hern, reaches the same result as do I, but through a different analysis. He proceeds from the major premise that the NBA expresses a general congressional intent, apart from the terms of the statute, that states must not favor state banks over national banks. *Post* at ____ (slip op. at 1). His minor premise is that New Jersey law permits lenders to impose late charges as interest. *Id.* at ____ (slip op. at 4). From this, he concludes that by permitting New Jersey banks, but not national banks, to impose such charges, New Jersey law violates the NBA.

My problem with his analysis is with its divination of congressional intent apart from the terms of the statute. For me, the reason that the NBA trumps RISA is that section 85 expressly permits national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located." "Interest," as previously explained, includes late charges. Close examination of the authorities cited by Justice O'Hern reveals that they rely not on metaphysical notions of congressional intent, but on the specific words of the statute. *Post* at ____ (slip op. at 3-4). I also find misplaced his concern that Congress did not intend states to "export" their "consumer protection attitudes" to other states. *Id.* at ____ (slip op. at 7).

The mischief hides in the term "export." When a South Dakota national bank charges interest, including late fees, as allowed by that state to a borrower in New Jersey, the charge is legal because the NBA expressly allows it, not because South Dakota is "exporting" its interest rate to New Jersey. The authority for the imposition of the charge is not South

Dakota law, but the NBA. Congress has defined the standard to measure the allowable rate of interest; that standard is interest as allowed by the national bank's home state. As Citibank's home state, South Dakota merely provides the point of reference. Only in a metaphorical sense is South Dakota "exporting" its rate of interest. In reality, a national bank may impose interest as allowed by its home state because Congress has so ordained.

For the preceding reasons, I respectfully dissent.

Justice Garibaldi joins in this dissent.

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Defendant-Respondent.

O'HERN, J., dissenting.

I agree with the majority that the National Bank Act does not preempt state consumer protection laws that prohibit late charges on credit card accounts. I would, however, allow national banks to assess late charges against credit card holders in New Jersey, not because the late charges are interest under the National Bank Act (they are not) and not because Congress has authorized the Comptroller of the Currency to preempt the State's consumer protection law, but because New Jersey law permits lenders to impose such late charges and may not discriminate against national banks that seek to impose the same charges.

In 1864 Congress enacted the National Bank Act, *c.* 106, 13 *Stat.* 99 (NBA). Section 85 of the NBA now provides that any national bank

> may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State * * * where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater * * *.
>
> [12 *U.S.C.A.* § 85.]

In addition to addressing interest rate differentials between state and national lending institutions, the NBA had a more profound purpose and effect — to assure that national

banking institutions were never put at any economic disadvantage in competition with state-chartered institutions.[1]

Before the Civil War, Jacksonian distrust of concentrated power of mercantile interests had brought about the demise of national banks and the rise of the state banking systems. *Clarke v. Securities Indus. Ass'n,* 479 *U.S.* 388, 413, n.5, 107 *S. Ct.* 750, 764, n.5, 93 *L. Ed.* 2d 757, 777, n.5 (1987) (Stevens, J., concurring).

> Enactment of the National Bank Act was part of Congress's attempt to induce state-chartered banks to convert to national charters in order to achieve several federal objectives, such as the development of a national currency, the creation of a market for federal bonds to finance the war, and the use of the national banks as depositories.
>
> [Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective,* 51 *Geo. Wash. L. Rev.* 676, 699 (1983).]

If state-chartered banking institutions were permitted to make loans on more favorable terms than nationally chartered institutions, then nationally chartered institutions would be at an economic disadvantage. Congress "deliberately settled upon a policy intended to foster 'competitive equality' " between national banks and state banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson,* 396 *U.S.* 122, 131, 90 *S. Ct.* 337, 342, 24 *L. Ed.* 2d 312, 318 (1969) (quoting *First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co.,* 385 *U.S.* 252, 261, 87 *S. Ct.* 492, 497, 17 *L. Ed.* 2d 343, 349 (1966)). In the *Walker Bank* case, involving branch banking issues, the Court wrote: "To us it appears beyond question that the Congress was continuing

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1. Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980, *Pub. L.* No. 96-221, 94 *Stat.* 132, authorize other federally insured depository institutions to collect interest as allowed by the laws of the state in which they are located. Those provisions generally confer on federally insured state banks the privileges that national banks enjoy under the NBA. For convenience of analysis, I refer only to the federally chartered institutions.

its *policy of equalization* first adopted in the National Bank Act of 1864." 385 *U.S.* at 261, 87 *S. Ct.* at 497, 17 *L. Ed.* 2d at 349 (emphasis added).

Because equalization, not preemption, is the congressional policy, New Jersey cannot grant late-charge privileges to its financial institutions and not to national banks:

> The purpose of section 85 is [1] to adopt the state law, relating to interest rates permitted, to permit national banks to charge the rate of interest allowed to competing lenders in the state, *and* [2] to guard against unfriendly federal-state legislation or ruinous competition with state chartered or licensed lenders. This interpretation of Section 85, commonly referred to as "the most favored lender policy" puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders. The statute prevents state legislation which purports to give state banks or possibly any state lender advantages over national banks.
>
> [*United Missouri Bank of Kansas City, N.A. v. Danforth*, 394 *F. Supp.* 774, 779 (W.D. Mo. 1975) (emphasis added).]

The New Jersey Department of Banking reasons that state-chartered credit unions "are authorized to offer credit cards and charge late charges without limit." (Letter from Francis P. Carr, Assistant Commissioner, New Jersey Department of Banking, to Dennis R. Casale 1 (Oct. 14, 1994) (citing *N.J.S.A.* 17:13-105(c)). Thus, even though late charges are not interest, a national bank must be permitted to impose late charges as long as a state lender may impose them. *See Saul v. Midlantic Nat'l Bank/South*, 240 *N.J. Super.* 62, 81 (App. Div.) (recognizing that under "most favored lender" doctrine, national banks may make loans on same terms as state-chartered credit union), *certif. denied*, 122 *N.J.* 319 (1990).

In addition, *S.* 1412, signed into law on March 7, 1995, amended the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C-1 to -61, the statute on which plaintiffs have based their claims in this case. The 1995 amendment expressly authorizes the holder of any retail charge account to collect

flat late charges. *N.J.S.A.* 17:16C-42. After that amendment there can be no question that a nationally chartered credit card lender may not impose such late charges, at least to the extent allowed under *S.* 1412. Were it otherwise, Citibank explains, there would be favoritism shown to state lenders:

> The favored lender, by contracting for flat, contingent charges from late payers, can protect itself against risks and costs associated with delinquencies while keeping monthly percentage charges low to attract good customers who are consistently punctual. The disfavored lender, who cannot collect late charges, tends to get all the customers who anticipate paying late and tends to lose the customers with strong credit and habits of punctuality because it must impose higher monthly percentage charges to make up for its inability to impose late charges.

That competitive advantage cannot be given to the state-chartered institutions. *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.,* 464 *F.*2d 855, 863 (6th Cir. 1972), held that because a Michigan-chartered savings and loan association was permitted to charge a borrower (in addition to interest) the closing costs of a real estate loan, a national bank could legally impose such additional charges. The *Northway Lanes* court quoted a principal drafter of the NBA, Senator John Sherman of Ohio, who explained that the purpose of the NBA was "to confer on these national banks the same privileges that are conferred by the laws of the States on other associations and individuals * * * [and] to place the national banks in each state on precisely the same footing with individuals and persons doing business in the state by its laws." 464 *F.*2d at 861 (quoting *Cong. Globe,* 38th Cong. 1st Sess. 2126 (1863)).

"National banks have been national favorites." *Tiffany v. National Bank of Missouri,* 85 *U.S.* (18 Wall.) 409, 413, 21 *L. Ed.* 862, 864 (1874). The NBA confers on them *"at least competitive equality"* with other lenders and a "possible advantage over state banks in the field of interest rates." *Fisher v. First Nat'l Bank of Omaha,* 548 *F.*2d 255, 259 (8th Cir. 1977) (emphasis added). No state may create a competitive disadvantage by favoring any class of state lenders over national

lenders, as New Jersey would favor its state lenders if they alone can impose late charges. An Opinion Letter from the Office of the Comptroller of the Currency explains:

> [I]f a state allows state banks to charge credit card annual fees at flat rates, then section 85 allows national banks to do so as well. If national banks were not allowed to match state-regulated lenders on these flat loan charges, then the "most favored lender" principle would be destroyed.
>
> [Letter from Julie L. Williams, Chief Counsel, to John L. Douglas (Feb. 17, 1995), 1995 WL 71676 (OCC), *6.]

Plaintiffs seek to avoid the application of the "most favored lender" doctrine by arguing that The Credit Union Act, *N.J.S.A.* 17:13-73.1 to -125, did not always authorize unlimited late fees on retail charge cards, insisting that the more specific provisions of RISA controlled retail credit card transactions. Plaintiffs' interpretation of the law is of little consequence as long as the State regulators continue to permit state-chartered lenders to impose late charges. The NBA forbids precisely that form of discrimination against national banks.

States have a profound interest in their consumer protection laws. *Marguette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 *U.S.* 299, 314, 99 *S. Ct.* 540, 548, 58 *L. Ed.* 2d 534, 545-46 (1978), held only that "interest rates of one State [can be] 'exported' into another" because a literal application of the plain language of "rate allowed" in Section 85 compelled that result. Only a distorted reading of Section 85 would allow exportation of the consumer protection attitudes of the home state of the national bank. See William G. Bornstein, Comment, *Extension of the Most Favored Lender Doctrine Under Federal Usury Law: A Contrary View*, 27 *Vill. L. Rev.* 1077, 1107-08 (1981-82) (analyzing the *Marquette* holding).

I cannot imagine that Congress intended that South Dakota or Delaware be permitted to export their concepts of consumer protection and to preempt and nullify the consumer protection laws of New Jersey. I therefore agree with that portion of the Court's opinion.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2884-92T3

JAMES H. HUNTER, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,
Defendant-Respondent.

Argued January 27, 1994 Decided April 22, 1994
Before Judges Shebell, Long and Landau.

On appeal from the Superior Court of New Jersey, Law Division, Camden County.

Michael D. Donovan of Chimicles, Burt, Jacobsen & McNew, admitted *pro hac vice,* argued the cause for appellant; Spector Gadon & Rosen, attorneys for appellant (Ann Miller, admitted *pro hac vice,* of counsel; Paul R. Rosen and Robert L. Grundlock, Jr., on both the brief and the reply brief).

Sean T. O,Meara argued the cause for respondent (Archer & Greiner, attorneys for respondent); Alan S. Kaplinsky and Burt M. Rubin of Wolf, Block, Schorr and Solis-Cohen, admitted *pro hac vice,* of counsel.

The opinion of the court was delivered by LONG, J.A.D.

Plaintiff, James M. Hunter, here appeals from the trial judge's dismissal of the class action he filed against defendant, Greenwood Trust Company, to invalidate the late charges imposed by defendant on his credit card account.

I.

Greenwood is a federally insured bank, chartered under Delaware law, located in New Castle, Delaware. One of the

banking services provided by Greenwood is the Discover Card, which cardholders use to charge items and to make purchases by borrowing money from Greenwood on an open-ended credit basis. Greenwood issues its Discover Card to credit card applicants pursuant to a Cardmember Agreement which cardholders receive when they obtain their credit cards.

Among numerous other provisions, the Cardmember Agreement specifies the annual percentage rate finance charge which Greenwood assesses against the outstanding monthly debt balance on its cardholder's accounts. The Cardmember Agreement also provides that if a cardholder fails to make a specified minimum payment on the outstanding debt balance within twenty days of the payment due date stated in a monthly bill, a late charge of ten dollars will be assessed against the cardholder's account. The late charge is added to the cardholder's outstanding balance and the annual percentage rate finance charge is applied to that outstanding balance in subsequent billings. The cardholder may incur multiple ten-dollar late payment charges on his or her account for failure to make the minimum payment during several billing cycles. Greenwood issues its Discover Card to applicants throughout the United States. More than 10,000 residents of New Jersey have received these cards.

Plaintiff is a New Jersey resident who received his Discover Card from Greenwood in 1985. On at least three occasions between 1985 and 1991, plaintiff did not pay the minimum monthly amount specified on his Discover Card bill. Consequently, he incurred at least three ten-dollar late payment charges over the years and those charges were added to his outstanding debt balance in subsequent billings.

Plaintiff filed a complaint, later amended to class action form, which alleged that the ten dollar late charge Greenwood imposes for a cardholder's failure to pay the minimum monthly amount on an outstanding debt balance violates New Jersey statutory law, specifically provisions of the Retail Installment Sales Act, *N.J.S.A.* 17:16C-50 and -54 and the Consumer Fraud Act, *N.J.S.A.* 56:8-2 and -19. Plaintiff also

alleged violations of New Jersey common law, specifically breach of contract and conversion, based upon the illegally imposed late charges.

Greenwood moved to dismiss the amended complaint for failure to state a claim upon which relief could be granted. In so moving, it asserted that plaintiff's is state law based claims were preempted by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (codified as section 27 of the Federal Deposit Insurance Act (12 U.S.C.A. §1831d)) (hereinafter section 521).

The trial judge, Judge Fratto, ruled that by enacting section 521 Congress intended to preempt "the entire area" covering interest rates and the assessment of late payment charges by state-chartered, federally insured banks like Greenwood. Accordingly, he entered an order dismissing plaintiff's amended complaint.

Plaintiff appeals, contending that section 521 preempts state interest laws but excludes late charges from its preemptive scope. He also urges that, even if preemption is applicable to his state statutory claims, his state common law claims should not have been dismissed. We have carefully reviewed this record in light of these contentions and have concluded that there is no warrant for our intervention.

II.

In 1864, Congress enacted the National Bank Act (NBA) *ch.* 106, 13 *Stat.* 99 (codified, as amended, in scattered sections of the United States Code). Section 85 of the NBA, states in relevant part that:

> Any association (national bank) may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .

(12 *U.S.C.A.* § 85.]

The intent of section 85 was to protect national banks from discriminatory state banking laws. *See Greenwood Trust Co. v. Massachusetts,* 971 *F.* 2d 818, 826 n.6 (1st Cir. 1992), *cert. denied,* ____*U.S.* ____, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993). By permitting national banks to charge interest at the rate allowed by a state's law or at a rate tied to the local federal discount rate, Congress prevented states from favoring state-chartered banks to the detriment of national banks as to the amount of interest that could be charged on bank loans. *Ibid.*

Ten years after the NBA was enacted, the United State Supreme Court construed section 85 in *Tiffany v. National Bank,* 85 *U.S.* (18 Wall.) 409, 21 *L. Ed.* 862 (1873). There, the Court announced what became known as the "most favored lender" doctrine, under which national banks could not be placed at a competitive disadvantage with respect to *any* state-regulated lender. Specifically, *Tiffany* allowed a national bank to charge interest rates chargeable by natural persons under Missouri law. 85 *U.S.* at 413, 21 *L. Ed.* at 863-64. The "most favored lender" doctrine has subsequently been interpreted to give national banks the same interest rate privileges as any competing state institutions, including small loan companies and retail installment sellers. *See, e.g., Fisher v. First Nat'l Bank,* 538 *F.* 2d 1284, 1289-90 (7th Cir. 1976), *cert. denied,* 429 *U.S.* 1062, 97 *S. Ct.* 786, 50 *L. Ed.* 2d 778 (1977).

In 1936, the Comptroller of the Currency issued an interpretation of section 85 which administratively recognized the "most favored lender" doctrine as part of federal banking law. *See* Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards,* ¶11.09, at 43 (3d ed. 1990). The "most favored lender" doctrine was later formally incorporated into the Comptroller's regulations covering national banks. 12 *C.F.R.* § 7.7310(a) (1993).

The margins of the most favored lender doctrine were later tested in *Marquette National Bank v. First of Omaha Service Corp.,* 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978). There, First National Bank of Omaha, a national bank char-

tered in Nebraska, where the allowable interest rate ranged up to eighteen percent on outstanding credit card balances, attempted to "export" that rate to Minnesota, where it had solicited BankAmericard customers and where the allowable interest rate was only twelve percent. *Marquette Nat'l Bank,* 439 *U.S.* at 302-304, 99 *S.Ct.* at 542-43, 58 *L. Ed.* 2d at 538-39. Minnesota law permitted credit card issuers within its borders to charge an annual usage fee to cardholders to compensate for the relatively low rate of allowable interest. *Id.* at 303, 99 *S.Ct.* at 542, 58 L. Ed. 2d at 538-39. A national bank located in Minnesota, Marquette National Bank, brought an action to enjoin First of Omaha from soliciting business in and from "exporting" interest rates to Minnesota, asserting that it was losing BankAmericard customers to First of Omaha because Minnesota's law twelve percent interest rate compelled it to charge its cardholder customers a ten-dollar annual fee for use of the card. *Id.* at 304, 99 *S.Ct.* at 543, 58 *L. Ed.* 2d at 539. The Minnesota-based national bank was rebuffed by the Minnesota Supreme Court and appealed.

The United States Supreme Court determined that the case was governed by section 85, and ruled that a national bank may charge interest on any loan at the rate allowed by the state where the bank is located. *Id.* at 313-19, 99 *S.Ct.* at 547-50, 58 *L. Ed.* 2d at 544-48. The Court unanimously held that First of Omaha could charge its Minnesota customers the interest rate allowed under Nebraska law, even though that rate was greater than the rate allowed in Minnesota for a Minnesota-based national bank. *Id.* at 318-19, 99 *S.Ct.* at 550-51, 58 L.Ed. 2d at 547-48. *Marquette* effectively permitted a national bank to "export" its home state's interest rates on credit card accounts to other states.

Within two years of *Marquette*, the United States experienced a credit upheaval which included soaring interest rates. *See Greenwood Trust Co., supra,* 971 *F.*2d at 826. National banks fared well on credit card transactions because they could either "export" favorable home state interest rates or charge interest tied to very high local federal discount rates, pursuant to section 85 of the NBA. *Ibid.* State-chartered banks, however, could not do so because their interest rates

were constrained by the ceilings imposed by the various states' usury laws, some of which were unrealistically low. *Ibid.* Congress sought to "level the playing field between federally chartered and state-chartered" banks by enacting DIDA section 521 of which is at issue here. *Ibid.*

Section 521, codified as 12 *U.S.C.A.* § 1831d(a), states that:

> [i]n order to prevent discrimination against State-chartered [F.D.I.C.-] insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

This section is an analogue to section 85 of the NBA. *Greenwood Trust Co.*, 971 *F.* 2d at 826-28. Its purpose is to achieve a measure of parity and competitive equity between national banks and state-chartered banks by permitting state-chartered banks to enjoy the same "most favored lender" status that national banks enjoy. *Ibid.* To assure that equalization, Congress made a conscious choice to incorporate the section 85 standards into DIDA. *Id.* at 827.

Thus, under DIDA, federally insured state-chartered banks are "most favored lenders" and may charge interest at the rate permitted by any competing lending institution in their home states. *See VanderWeyst v. First State Bank*, 425

N.W. 2d 803, 806 (Minn. 1988) (stating that "[w]e conclude that the 'rate allowed' clause should be construed as granting to federally-insured, state-chartered banks most favored lender status. We are persuaded that by using the same 'rate allowed' language in . . . [the DIDA] that appears in [section 85 of] the National Bank Act, Congress intended to give that status to state insured banks"), *cert. denied,* 488 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988); *accord, First Bank v. Miller,* 347 *N.W.* 2d 715, 718-20 (Mich. App. 1984). To the extent that the home state's law would interfere with a state-chartered bank's interest charges in the home state, those state laws are expressly preempted under section 521 of DIDA. 12 *U.S.C.A.* § 1831d(a).

Although the United States Supreme Court has not yet definitively ruled on the question of whether state-chartered banks are permitted to "export" their home state's interest rates in the same manner an national banks under *Marquette,* persuasive authority supports the proposition that the *Marquette* exportation rationale is equally applicable to state-chartered banks because of the parallels between DIDA § 521 and NBA § 85.

In *Greenwood Trust Co. v. Massachusetts, supra,* a state-chartered bank located in Delaware sought to impose upon its Massachusetts credit cardholders a late payment charge authorized under Delaware law but forbidden under Massachusetts law. The federal district court ruled that section 521 of DIDA did not preempt Massachusetts law. 971 *F.* 2d at 821. The Delaware bank appealed and the First Circuit reversed. After determining that section 521 of DIDA and section 85 of the NBA are so similar in purpose and wording that courts are required to construe them in pari materia, the court concluded that the "principle of exportation" is "solidly embedded in the language and purpose of both acts." *Id.* at 827. Therefore, the *Marquette* rationale is applicable to section 521 and, "[t]o the extent that a law or regulation enacted in a borrower's home state purposes to inhibit the [out-of-state] bank's choice of interest term under section 521, DIDA expressly preempts the state law's operation." *Ibid. See also Hill v. Chemical Bank,* 799 *F. Supp.* 948, 951-54 (D. Minn. 1992) (holding that section

521 preempts state law and implicitly recognizing the right of a bank chartered in New York to "export" interest rates and late payment charges to Minnesota borrowers, despite a law that prohibits Minnesota banks from assessing those charges). Thus, according to *Greenwood,* a state-chartered bank may "export" the interest rate allowed on credit card accounts under the laws of its home state to the borrower's state, pursuant to section 521 and *Marquette. See also Watson v. First Union Nat'l Bank,* 837 *F. Supp.* 146 (D.S.C. 1993) (holding that sections 85 and 86 of the National Bank Act, which govern the interest national banks can charge, completely preempt state law claims against national banks for usury; that out-of-state national banks may therefore export interest rate to cardholders in second state; and that credit card overlimit fees are interest under sections 85 and 86); and *Goehl v. Mellon Bank,* 825 *F. Supp.* 1239 (E.D. Pa. 1993) (holding that sections 85 and 86 of the National Bank Act completely preempt credit card customers' claims that national banks violated state law by charging late fees in addition to interest and that late fees were interest under the Act). *But see Copeland v. MBNA America, N.A,* 820 *F. Supp.* 537 (D. Colo. 1993) (holding that for federal jurisdiction purposes, federal law does not preempt state law because ordinary meaning of word "interest" in sections 85 and 86 of National Bank Act does not include late fees).[1] This is the backdrop against which this case must be evaluated.

III.

We turn first to plaintiff's argument that the late payment charges incurred by him did not constitute allowable interest on the outstanding credit card debt balance and thus fall outside the preemptive scope of DIDA. *Greenwood* addressed an identical issue and concluded that a ten-dollar late payment charge on delinquent Discover card accounts was exportable interest. *Greenwood,* 971 *F.* 2d at 828-31. We adopt the reasoning which undergirded this conclusion and which we find per-

1. Upon remand, in an unpublished opinion, the state court dismissed plaintiff's claims upon defendant's motion for summary judgment. *Copeland v. MBNA America, N.A.,* No. 92 CV 3909 (Colo. Dist. Ct. Denver July 9, 1993) (appeal filed).

suasive. First, *Greenwood* relied on section 521 "which allows a state bank to charge interest 'at the rate allowed by the laws of the State . . . where the bank is located.' " *Id.* at 829. By this provision, the laws of Delaware — Greenwood Trust Company's home state — provide the definition of the term "interest." *Ibid.* Delaware law explicitly states that delinquency charges imposed on late payments on a revolving credit plan constitute "interest." *Del. Code. Ann.* tit. 5, § 950 (1988). Plainly then, the charge at issue here as in *Greenwood* (this is the same bank and the same charge) must be considered "interest" under current Delaware law. Moreover, a Delaware court has previously characterized "interest," in part, to be "the penalty for the delays in the payment of a debt." *Phillips v. Phillips,* 91 *A.* 452, 455-56 (Del. Ch. 1914). That definition of the term "interest" brings within its ambit the late payment charge at issue here which can readily be characterized as a penalty.

Nothing in *Agostini v. Colonial Trust Co., 36 A.* 2d 33, 36-37 (De. Ch. 1945), cited by plaintiff, suggests a contrary result. *Agostini's* conclusion that interest is compensation, measured by time, for a loan of money is nothing more than a methodology for computing interest to be evaluated under the state usury law. It does not delimit the charges theoretically includable within the concept of interest and cannot circumscribe the after-enacted 1988 Delaware law which specifically includes late charges within the interest rubric.

Further, as *Greenwood* observed, a number of federal courts have construed the term interest in section 85 of the NBA "to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate." 971 *F.* 2d at 829. According to *Greenwood,* when section 521 is read in pari materia with section 85, those lender-imposed fees would also be categorizable as exportable "interest" for state-chartered banks. *Id.* at 829-30.

More to the point, six federal district court decisions have recently determined that late payment charges on credit cards, like the charge in dispute here, are "interest." *See Ament v. PNC Nat'l Bank,* No. 92-244 (W.D. Pa. April 8, 1994); *Watson v. First Union Nat'l Bank, supra,* 837 *F. Supp.* 146; *Goehl v.*

Mellon Bank, supra, 825 F. Supp. 1239; *Tikkanen v. Citibank, N.A.*, 801 *F. Supp.* 270 (D. Minn. 1992); *Hill v. Chemical Bank, supra,* 799 *F. Supp.* 948; and *Nelson v. Citibank, N.A.*, 794 *F. Supp.* 312 (D. Minn. 1992). *Hill* is particularly noteworthy because it dealt with a state-chartered bank and because it held that the late payment charge at issue there fell within the preemptive scope of DIDA § 521 because it was "interest."

Plaintiff attempts to distinguish the federal case law relied upon in *Greenwood* by asserting that those cases deal with "upfront lending charges," rather than with charges for the late payment of the outstanding credit card debt. To us, this distinction is unpersuasive. The point is that the charges characterized as "interest" by the federal courts were not "compensation, measured by time, for a loan of money." Instead, the charges were generally flat fees, like the late payment charge in dispute here. The federal courts effectively categorized those flat fee charges as "interest" for purposes of section 85 of the NBA. *Tikkanen,* 801 *F. Supp.* at 276-78; *Hill* 799 *F. Supp.* at 952-54, *Nelson,* 794 *F. Supp.* at 316-321. *See also, Fisher v. First Nat'l Bank,* 548 *F.*2d 255, 258-61 (8th Cir. 1977) (where the court impliedly considered a five-dollar flat fee authorized by the national bank's home state for cash advances on a credit card made in a second state to be a component of "interest" which could be imposed by the national bank under the "most favored lender" doctrine).

In light of this federal case law, we think *Greenwood* correctly concluded that federal common law includes late payment charges within the meaning of the term "interest" for purposes of exportation under the *Marquette* rationale. 971 *F.*2d at 825.

Greenwood's final ground for concluding that the bank's ten-dollar late payment charge was exportable interest involved "the rulings and informal opinion letters of the various agencies charged with interpreting the meaning of section 85 and section 521." 971 *F.*2d at 830. Those rulings and opinion letters almost uniformly indicate that late payment fees are includable as "interest" for purposes of section 85 of the NBA and section 521 of the DIDA. *Ibid.* (citations omitted).

We are fully satisfied with the reasoning of *Greenwood* and adopt it here. Section 521 must be construed in pari materia with section 85; such construction compels the conclusion that late payment charges are exportable interest charges under DIDA § 521.

IV.

Plaintiff's remaining arrgument on appeal is that even if his New Jersey statutory claims were properly dismissed, his common law claims for breach of contract and for conversion were not preempted by DIDA § 521. His contention is that these claims survive under the reasoning of *Cipollone v. Liggett Group, Inc.*____ *U.S.* ____,112 *S. Ct.* 2608, 120 *L. Ed* 2d 407 (1992).

The preemption principle is based on the supremacy clause of the United States Constitution, and requires that state law yield to federal law where the two are not consistent or are in conflict. *U.S. Const.*, art. VI, cl. 2; *Feldman v. Lederle Lab.*, 125 *N.J.* 117, 133 (1991), *judgment aff'd as modified,* 132 *N.J.* 339 (1993); *Miller v. Northwest Airlines*, 253 *N.J. Super,* 618, 622 (App. Div. 1992). State statutes and common law may both be preempted by federal legislation. *Dewey v. R. J. Reynolds Tobacco Co.*, 121 *N.J.* 69, 77 (1990). "The essential question for any preemption analysis is 'whether Congress intended that the federal regulation supersede state law.' " *Ibid.*, (quoting *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n,* 476 *U.S.* 355, 369, 106 *S. Ct.* 1890, 1899, 90 *L. Ed.* 2d 369, 382 (1986)). *See also Maher v. New Jersey Transit Rail Operations,* 125 *N.J. 455, 464 (1991).*

Section 521 of DIDA, which states that "any State constitution or statute . . . is hereby preempted for the purposes of this section," 12 *U.S.C.A.* § 1831d(a) (1988), is an express preemption of state law by Congress. The congressional intent underlying that preemption is explicitly set out in the first ten words of section 521, which state that it was enacted "[i]n order to prevent discrimination against State-chartered insured depository institutions." *Ibid.*

On appeal, plaintiff contends that his common law claims do not fall within the express preemptive ambit of section 521 because that section only preempts a "State constitution or

statute." Plaintiff relies for this proposition on *Cipollone* in which the Supreme Court effectively stated that the term "state law" in a federal statute would include state common law for preemption purposes, but that the term "state statute or regulation" would include only "positive enactments" by state legislatures and agencies. See *Cipollone,* ____*U.S.* at ____, 112 *S.Ct.* at 2619-21, 120 *L. Ed.* 2d at 425-27. Plaintiff reasons that section 521's preemptive language is expressly targeted only to "positive enactments" — State constitutions and statutes — and not to common law claims. Thus, according to plaintiff, his common law claims are not preempted.

The problem with plaintiff's contention is his implicit assertion that the *Cipollone* decision provides a bright-line test for the preemption of common law claims. Not so. Cipollone recognized that not all state common law claims were preempted because, for the purposes of the federal act under review *there,* "the common law is not of a piece."____ *U.S.* at ____112 *S.Ct.* at 2621, 120 *L.Ed.* 2d at 427. The Court then differentiated between those common law claims which actually contravened the congressional intent underlying the federal statute and those common law claims which did not contravene that intent; the common law claims which contravened congressional intent were preempted, while those which did not were not.____ *U.S.* at ____, 112 *S.Ct.* at 2621-25, 120 *L. Ed.* 2d at 427-31. Thus, as *Cipollone* recognized, the intent of Congress is the "ultimate touchstone" of a preemption analysis. ____*U.S.* at ____, 112 *S.Ct.* at 2617, 120 *L. Ed.* 2d at 422.

Here, the question is whether allowance of plaintiff's common law claims for breach of contract and conversion would contravene the congressional intent expressed in DIDA "to prevent discrimination against State-chartered insured depository institutions." 12 *U.S.C.A.* § 1831d(a). In our view, it would.

This is so because allowance of plaintiff's claims would restrain state-chartered banks which attempted to charge late payment fees to their out-of-state customers. National banks, however, could charge those fees without interference from common law claims like plaintiff's because national banks operate under section 85 of the National Bank Act. *See*

Tikkanen, 801 *F. Supp.* at 279-80. State-chartered banks would therefore suffer a disadvantage in relation to national banks if plaintiff's common law claims were allowed. This is precisely the type of discriminatory disadvantage which Congress expressly sought to eradicate through DIDA. For this reason, we hold that DIDA should preempt plaintiff's common law claims as well as his statutory claims.

Affirmed.

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on behalf of himself and all	:	LAW DIVISION
others similarly situated,	:	CAMDEN COUNTY
Plaintiff,	:	DOCKET NO. L-02509-92
vs.	:	Civil Action
GREENWOOD TRUST	:	ORDER DISSMISSING THE
COMPANY,	:	AMENDED CLASS ACTION
Defendant.	:	COMPLAINT FOR
		FAILURE TO STATE A CLAIM

THIS MATTER having come before the Court on motion of Archer, Greiner, A Professional Corporation, attorneys for defendant, Greenwood Trust Company, for an Order Dismissing the Amended Class Action Complaint for Failure to State a Claim, and the Court having reviewed the Briefs submitted in support of and in opposition to the motion, and having heard oral argument, and for good cause shown;

IT IS on this 5th day of February, 1993 ORDERED that the Amended Class Action Complaint is dismissed with prejudice for failure to state a claim.

_____
John A. Fratto, J.S.C.

____ Opposed
____ Unopposed

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

SUPPLEMENTAL BRIEF OF PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner Greenwood Trust Company ("Greenwood") submits this Supplemental Brief to apprise the Court of a new decision rendered by the Colorado Supreme Court concerning the issue raised in Greenwood's Petition for a Writ of Certiorari.

On December 18, 1995, the same day that Greenwood filed its Petition in this Court, the Colorado Supreme Court unanimously held that flat credit card late charges assessed by Greenwood are "interest" under Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d. *Stoorman v. Greenwood Trust Co.*, No. 94SC382 (Colo. Dec. 18, 1995) (attached hereto). The same interpretation of Section 27 of

the FDIA has been reached in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993), and *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal. Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal. Rptr.2d 748 (Cal. 1995), *petition for cert. filed*, No. 95-951 (U.S. Dec. 18, 1995).

However, as discussed previously in Greenwood's Petition for Certiorari, the New Jersey Supreme Court ruled 4-3 in this case that Greenwood's flat credit card late charges are not "interest" under Section 27 of the FDIA.

There is a direct conflict in the courts below concerning Section 27 of the FDIA that can be resolved only by this Court. For national credit card lenders such as Greenwood the conflict creates tremendous uncertainty and disruption; indeed, as matters now stand, Greenwood's exportation of late fees has been held permissible under Section 27 of the FDIA by the First Circuit and Colorado Supreme Court, but declared illegal by the New Jersey Supreme Court. These conflicting rulings on an issue of tremendous economic ramifications warrant review by this Court.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO
NO. 94SC382

DECEMBER 18, 1995

SAMUEL J. STOORMAN, on behalf of himself and all others similarly situated, *Petitioner,*

v.

GREENWOOD TRUST COMPANY, *Respondent.*

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT AFFIRMED

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JUSTICE MULLARKEY delivered the Opinion of the Court.
JUSTICE SCOTT does not participate.

We granted certiorari to review the court of appeals' decision in *Stoorman v. Greenwood Trust Co.*, 888 P.2d 289 (Colo. 1994). The court of appeals held that section 521 of the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. section 1831d(a) (1988), preempted section 5-3-203(5)(a) of the Colorado Uniform Consumer Credit Code (UCCC), section 5-3-203(5)(a), 2 C.R.S. (1992), thereby allowing a federally-insured, state-chartered bank located in Delaware to a charge a ten dollar late payment fee in addition to a finance charge to the credit card accounts of its Colorado customers. We affirm the judgment of the court of appeals, but we base our decision on different grounds.

I.

The respondent, Greenwood Trust Company (Greenwood), issues the Discover credit card and is a federally-insured, state-chartered bank located in Delaware. The petition, Samuel J. Stoorman (Stoorman), is a Colorado resident who became a Discover credit card member. When Stoorman failed to make a minimum monthly payment on his Discover credit card account, Greenwood assessed a ten dollar late payment fee to Stoorman's card account.

Stoorman initiated this class action, on behalf of himself and all others similarly situated, alleging that Greenwood violated section 5-3-203(5)(a) of the UCCC by charging a late payment fee in addition to a finance charge to his Discover credit card account. The district court grated Greenwood's motion for summary judgment, holding that section 521 of the DIDA preempts the Colorado consumer protection law. The court of appeals affirmed the dismissal, and we granted certiorari. We conclude that, as a matter of federal law, the ten dollar late payment fee imposed on Stoorman's Discover credit card account is a form of "interest" under section 521 of DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

II.

As a federally-insured, state-chartered bank, Greenwood is governed by the DIDA. 12 U.S.C. § 1831d(a). Congress enacted the DIDA in 1980 in response to economic conditions affecting the banking industry. *Hill v. Chemical Bank,* 799 F. Supp. 948 , 951 (D. Minn. 1992). In 1979, the Federal Reserve rate rose sharply as a result of the unprecedented crisis of simultaneous recession and inflation. The increase in the Federal Reserve rate caused national banks to gain a competitive advantage over state banks in states with lower interest rate ceilings. The DIDA was enacted to create parity between national and state banks. *Id.* Section 521 of the DIDA, 12 U.S.C. section 1831d(a), provides:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates, such State bank[s] . . . may, notwithholding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any note, bill of exchange, or other evidence of debt, interest at the rate . . . allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 1831d(a) (1988). Congress incorporated the language of section 85 of the National Bank Act (NBA), 12 U.S.C. section 85, which governs national banks, into section 521 of the DIDA. *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 825 (1st Cir. 1992), *cert. denied,* 113 S. Ct. 974 (1933). Section 85 of the NBA provides:

> Any, association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 85 (1982).

Neither the NBA nor the DIDA defines the term "interest" or "interest at the rate." Generally, similar language should be interpreted in the same manner, unless the context requires different interpretation. *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). Moreover, Congress is presumed to be

aware of judicial interpretations of statutory language when it intentionally incorporates the language of one statute into another statute. *Id.*

In *Copeland v. MBNA Am. Bank, N.A.* No. 94SC409 (Colo. Nov. 20, 1995), we examined the definition of the term "interest" in section 85 of the NBA. In *Copeland,* we held that, as a matter of federal law, late payment fees are included as a form of "interest" under section 85 of the NBA, U.S.C. section 85 (1982). Thus, federal law authorized a national bank located in Delaware to charge Colorado customers a fifteen dollar late payment fee as allowed under Delaware law.

In this case, we must define the term "interest" in section 521 of the DIDA. We are persuaded for several reasons that late payment fees are a form of "interest" under section 521 of the DIDA. First, because section 521 of the DIDA incorporates its language from section 85 of the NBA, the statutory language should be given the same interpretation. Moreover, the Federal Deposit Insurance Corporation (FDIC), the government agency charged with administering the DIDA, has interpreted the term "interest" in section 521 of the DIDA as including late payment fees charged by federally-insured, state-chartered banks. *See* 12 C.F.R. § 7.7310(a). Finally, the majority of decisions examining the definition of the term interest in section 521 of the DIDA have held that late payment fees are included as a form of interest. *See Greenwood,* 971 F.2d at 818; *Ament v. PNC Nat. Bank,* 849 F. Supp. 1015 (W.D. Pa. 1944); *Hill,* 799 F. Supp. at 948. *Compare with Hunter v. Greenwood Trust Co.,* No. A-103-94 (N.J. Nov. 28, 1995); *Gadon v. The Chase Manhattan Bank,* 653 A.2d 697 (Pa. Super. 1995).

Therefore, we conclude, that, as a matter of federal law, late payment fees are included as a form of "interest" under section 521 of the DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a ten dollar late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

Accordingly, we affirm the judgment of the court of appeals.

JUSTICE SCOTT does not participate.

(3)

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No. 95-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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SECOND SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner Greenwood Trust Company ("Greenwood") submits this Second Supplemental Brief to apprise the Court of a significant new decision rendered by the Court of Appeals for the Third Circuit concerning the issue raised in Greenwood's Petition for a Writ of Certiorari.

On December 29, 1995, the Third Circuit held that credit card late charges are "interest" under Section 85 of the National Bank Act ("NBA"). *Spellman v. Meridian Bank (Delaware),* Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 at *56 to *68 (3d Cir. Dec. 29, 1995). Unlike the New Jersey Supreme Court, the Third Circuit specifically

rejected the argument that the term "interest" in Section 85 "can only apply to charges in the form of periodic percentage rates," declaring that "we do not believe the term is either so limited in meaning or so self-defining." *Id.* at *56. Instead, the Third Circuit relied upon this Court's decision in *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872), which defined "interest" as "the compensation. . . for the use or forbearance of money, or as damages for its detention." The Third Circuit found that late charges fit comfortably within this definition.

The Third Circuit's recent decision creates yet another conflict with the New Jersey Supreme Court's unprecedented decision in this case that can be resolved only by this Court's grant of a writ of certiorari. The New Jersey Supreme Court's decision that late charges are not "interest" under Section 27 of the Federal Deposit Insurance Act ("FDIA") and Section 85 of the NBA squarely conflicts not only with the Third Circuit decision, but also with decisions by the Court of Appeals for the First Circuit, the California Supreme Court, and the Colorado Supreme Court. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (filed Nov. 30, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995); *Stoorman v. Greenwood Trust Co.*, No. 94 SC 382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94 SC 409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94 SC 670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995).

Moreover, as discussed in Greenwood's Petition for a Writ of Certiorari (pp. 11-13), the New Jersey Supreme Court's decision in this case also conflicts with the statutory interpretations of five different federal banking agencies.

The pressing need for Supreme Court resolution of the many conflicts created by the New Jersey Supreme Court's decision is vividly illustrated by the sharp conflicts now existing within the Third Circuit itself regarding the question of whether late charges are "interest" under Section 85 of the NBA and Section 27 of the FDIA. Although the Third Circuit has answered that question in the affirmative, directly contrary decisions were previously rendered by the New Jersey Supreme Court and by the intermediate appellate court in Pennsylvania. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending).

Thus, for banks and borrowers who are located in or doing business in New Jersey and Pennsylvania, the meaning of "interest" in Section 27 of the FDIA and Section 85 of the NBA turns solely on the happenstance of whether suit is brought in federal court or state court. By the same token, national credit card issuers such as Greenwood are also confronted with conflicts on a national level concerning the legality of their interstate exportation of late charges — while that practice has been judicially approved by the First Circuit, Third Circuit, and the highest courts of California and Colorado, it has been declared illegal by the New Jersey Supreme Court and Pennsylvania intermediate appellate court.

Given the vast sums of money involved, it is of paramount importance that there be uniformity and predictability with respect to the meaning of "interest" in Section 27 of the FDIA. That can be achieved only by the grant of a writ of certiorari by this Court.

Respectfully submitted,

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On Petition For A Writ Of Certiorari
To The New Jersey Supreme Court

AMICI CURIAE BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This amici curiae brief is filed by the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), and the Consumer Bankers Association ("CBA") in support of the Petition for a Writ of Certiorari filed by Greenwood Trust Company ("Greenwood"). The ABA, AFSA and CBA agree with Petitioner that a writ of certiorari should be granted in this case. Petitioner and Respondent have each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

The ABA is the largest national trade association of the commercial banking industry in the United States. It represents banks of all types and sizes: national banks and state-chartered banks; money center, regional and community banks; and both independent banks and banks owned by bank holding companies. There are ABA member banks in each of the 50 states and in the District of Columbia. In the aggregate, ABA member banks represent approximately 90 percent of the domestic assets of all American commercial banks.

The AFSA represents over 300 companies operating more than 10,000 offices that are engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned finance companies to the nation's largest financial services, retail and automobile companies. AFSA also represents numerous depository institutions.

The CBA was founded in 1919 to represent retail banks nationwide. Today, it represents approximately 750

bank holding companies, banks and thrift institutions that represent nearly 80 percent of all consumer credit held by federally-insured depository institutions. The CBA focuses on retail issues, including deposit, investment, and lending products and services. Its membership includes bank holding companies, regional, superregional, and money center banks, thrifts, and credit unions.

The meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d, has significance not only to Amici's members who are federally-insured state banks, but also to other federally-insured depository institutions as well. The language of Section 27 of the FDIA is virtually identical to that of Section 85 of the National Bank Act ("NBA"), 12 U.S.C. § 85, applicable to national banks, Section 4(g) of the Home Owners' Loan Act, 12 U.S.C. § 1463(g), applicable to federally-insured savings institutions, and Section 205(g) of the Federal Credit Union Act, 12 U.S.C. § 1785(g), applicable to federally-insured credit unions. Since the courts and federal banking agencies have uniformly held that the term "interest" has the same meaning in all of these statutes, this case is very important to all of Amici's members.

Also, Amici have a strong interest in this case because the interpretation of the meaning of "interest" in Section 27 of the FDIA affects not just credit card lending, but all types of lending. Moreover, the New Jersey Supreme Court's decision in this case has profound

implications for both interstate lending and intrastate lending by the Amici's members.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve a direct conflict between the New Jersey Supreme Court, which held that late charges are not "interest" under federal banking law, and the United States Courts of Appeals for the First Circuit and Third Circuit and the Supreme Courts of California and Colorado, all of which have reached a contrary conclusion. Also, the New Jersey Supreme Court's decision conflicts with numerous opinions by all of the federal banking agencies, which have held that late charges are "interest" under the federal banking laws.

Resolution of the conflict in the courts below is very important because of the great uncertainty that now exists with respect to the meaning of "interest" and the legality of the interstate exportation of late fees. Numerous states have laws that prohibit or limit late charges, and credit card issuers in states that allow late charges have relied on Section 27 of the FDIA and Section 85 of the NBA for many years to export late charges to credit cardmembers throughout the country. Amici's members can no longer be sure whether their long-established interstate lending practices are permitted under federal law, and the current lack of uniformity and predictability adversely affects both lenders and borrowers. Also, there are numerous class actions throughout the country against Amici's members involving the exportation of credit card late charges and other charges, and

many more class actions are likely to be filed as a result of the New Jersey decision. These cases seek billions of dollars in damages, and if the New Jersey decision is followed by other courts the potential liability could be ruinous to many of Amici's members.

ARGUMENT

I. Certiorari Should Be Granted to Resolve a Direct Conflict Between the New Jersey Supreme Court's Decision and Those of the First Circuit, Third Circuit, and Supreme Courts of California and Colorado

A writ of certiorari should be granted in this case pursuant to Supreme Court Rule 10(b) because a state court of last resort has decided an important federal question in a way that directly conflicts with the decisions of two other state courts of last resort and two United States courts of appeals.

The New Jersey Supreme Court ruled 4-3 in this case that the term "interest" in Section 27 of the FDIA does not include flat late charges, and instead is limited to periodic percentage rates. It reached the same conclusion with respect to Section 85 of the NBA in a companion case involving a national bank. *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995).[1]

[1] Pennsylvania's intermediate appellate court has also held that late charges are not "interest" under Section 27 of the FDIA

The New Jersey Supreme Court holding squarely conflicts with decisions by the First Circuit Court of Appeals, Third Circuit Court of Appeals, California Supreme Court, and Colorado Supreme Court, all of which have held that late charges assessed by credit card issuers *are* "interest" under Section 27 of the FDIA and Section 85 of the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995); *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995).

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and Section 85 of the NBA. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending).

As a result of the conflicts in the courts below, the determination of whether or not a particular card issuer's late charge is "interest" under Section 27 of the FDIA now depends on the vagaries of where suit is brought. For instance, although the First Circuit Court of Appeals and Colorado Supreme Court have specifically held that Greenwood's late charge is "interest" for purposes of Section 27 of the FDIA, the New Jersey Supreme Court and Pennsylvania Superior Court have both held that Greenwood's late charge is not "interest" that may be exported under Section 27. Within the Third Circuit, a conflict exists between the Court of Appeals and the state courts of New Jersey and Pennsylvania concerning the meaning of "interest" in Section 85 of the NBA and Section 27 of the FIDA.

The New Jersey decision also conflicts with statutory interpretations by all of the federal banking agencies. The Federal Deposit Insurance Corporation ("FDIC"), which is responsible for enforcing and interpreting the Federal Deposit Insurance Act, has opined that credit card late charges are "interest" under Section 27 of the Act. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992). The FDIC also expressed this opinion in *amicus* briefs it filed in the First Circuit, New Jersey Supreme Court, and Colorado Supreme Court.

The Office of the Comptroller of the Currency ("OCC") has rendered several opinions that late charges are "interest" under Section 85 of the NBA, the most recent of which was in OCC Interpretive Letter No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH)

¶ 83,618 (Feb. 17, 1995). The OCC has also recently proposed an Interpretive Ruling that sets forth its position that late charges are "interest" under Section 85 of the NBA. *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (March 3, 1995). Also, the OCC filed *amicus* briefs in the New Jersey, California, Colorado and Pennsylvania Supreme Courts urging them to hold that late charges are "interest" under Section 85.

As stated earlier, language virtually identical to that found in Section 27 of the FDIA and Section 85 of the NBA also appears in the statutes governing the "interest" that may be charged by federally-insured savings institutions (12 U.S.C. § 1463(g)) and federally-insured credit unions (12 U.S.C. § 1785(g)). The federal banking agencies charged with interpreting those statutes have concluded, like the FDIC and OCC, that late charges are "interest" under those statutes. *See* Letter of Karen Solomon, Office of Thrift Supervision Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 (Sept. 29, 1994) (interpreting 12 U.S.C. § 1463(g)); Letter of Harry W. Quillian, Federal Home Loan Bank Board Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 at p. 62,403 (June 27, 1986) (interpreting predecessor of 12 U.S.C. § 1463(g)); Letter of Richard S. Schulman, National Credit Union Administration Acting Associate General Counsel, 62 Banking Rep. (BNA) 766 (April 11, 1994) (interpreting 12 U.S.C. § 1785(g)).

Amici's members rely on the statutory interpretations by their regulators, and those interpretations were improperly disregarded by the New Jersey Supreme Court. This Court has made it clear that deference should

be accorded to the FDIC's interpretation of the FDIA and the OCC's interpretation of the NBA where, as is the case here, those interpretations are reasonable and fully consistent with the statutory language at issue. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995).

In light of the conflicts in the courts below, the entire banking industry is now faced with tremendous uncertainty regarding the legality under federal law of the long-standing practice of exporting late charges from states that allow such charges into those that either prohibit or restrict them. Billions of dollars are involved, and therefore it is essential to Amici's members that this Court resolve the conflicts in the courts below. As this Court emphasized in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299, 312 (1978), allowing uncertainty to exist concerning the meaning of the language used in Section 85 of the NBA (or Section 27 of the FDIA) would "throw into confusion the complex system of modern interstate banking."

II. The Meaning of the Term "Interest" in Section 27 of the FDIA Is An Issue of Substantial Importance

The interpretation of the meaning of "interest" in Section 27 of the FDIA is an issue of substantial national importance for many different reasons.

Scores of class action lawsuits were filed around the country against the nation's leading credit card issuers following the later-reversed November, 1991 decision by the district court in *Greenwood Trust v. Massachusetts* holding that credit card late charges are not "interest" under Section 27 of the FDIA. 776 F.Supp. 21 (D. Mass. 1991). These lawsuits seek hundreds of millions (if not billions) of dollars in damages for late charges imposed over a number of years.[2] If the New Jersey Supreme Court decision is allowed to stand, more suits are sure to be brought in the many states that prohibit late charges altogether or limit their amounts. The enormous damages sought in these cases could cause tremendous harm to many of Amici's members.

In the Third Circuit's very recent decision holding that late charges are "interest" under Section 85 of the NBA, the Court emphasized that "applying Section 85 only to periodic percentage rates would lead to an unworkable and undesirable hodgepodge of fee limits, and periodic rate provisions, under the laws of both the bank's state and the borrower's state." *Spellman v. Meridian Bank (Delaware), supra,* 1995 U.S. App. LEXIS 37149 at

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[2] In 1994 alone, the credit card industry collected approximately $2 billion in late charges. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

*62. The Third Circuit also explained that limiting the meaning of "interest" to periodic percentage rates would dramatically alter the overall "package" of terms and fees utilized by card issuers:

> States often allow lenders to utilize a variety of credit card charges as an integrated package. The Supreme Court noted this point in *Marquette*, 439 U.S. at 302-03, in which it discussed a Nebraska law that set higher percentage rates than did Minnesota law. The Court observed, 'To compensate for the reduced [annual rate of] interest, Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card.' *Id.* Some states could, for example, decide to limit lenders' use of late fees if those lenders are also imposing certain periodic rates. [Plaintiff's] interpretation could therefore result in a borrower in one of these states being subject to the periodic rate limits but not to the limits on other loan charges as well.

Id. at *62-*63.

If credit card issuers are restricted in their late charge authority, they may be forced to raise their periodic interest rates to all cardholders in order to recover the losses caused by the late payers. In *Smiley v. Citibank (South Dakota)*, the California Supreme Court stated that late payment "causes various costs relating to default, including collection – costs that may be especially high when, as is typically the case in credit card transactions, the underlying loan is unsecured. Late payment fees may be employed to impose default costs on late payers, who are responsible for them, and to avoid shifting them to timely

payers, who are not. Fairness is served thereby: late payment fees make late payers shoulder the burden they themselves have created." 11 Cal. 4th at 161.

Even though this case only involves late charges, the interpretation of "interest" in Section 27 of the FDIA will necessarily affect the exportation of other fees and charges customarily assessed by credit card issuers, such as annual fees, cash advance fees, non-sufficient funds fees, and over-limit fees. All of these fees have been exported throughout the country from the card issuers' states, whose laws allow such fees, notwithstanding prohibitions or limitations on such fees in a number of states where cardmembers reside. These fees, like late charges, are "interest" because they are imposed "for the use or forbearance of money, or as damages for its detention." *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872).

The interpretation of the meaning of "interest" in Section 27 of the FDIA will have wide-ranging repercussions, since Section 27 governs all types of lending programs, not just credit card lending. Also, Section 27 governs both interstate and intrastate lending by federally-insured state banks.

Insofar as intrastate lending is concerned, Amici's members have long relied on the "most favored lender" doctrine set forth in this Court's opinion in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), in order to avail themselves of the right to charge the fees permitted to the "most favored lender" located in the same State. As explained by both the Third Circuit and the California Supreme Court, if "interest" is construed narrowly to encompass only periodic percentage rates,

then states could enable certain favored lenders to charge particular fees, and federally-insured depository institutions would no longer be able to borrow the right to assess such fees pursuant to the "most favored lender" doctrine. *Spellman v. Meridian Bank (Delaware)*, 1995 U.S. App. LEXIS 37149 at *62 ("A narrower definition [of 'interest'] would allow states to permit certain favored lenders to assess these charges while denying national banks the same privilege."); *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 154 ("If 'interest' were not read as indicated above [to include fees other than periodic percentage rates], the purpose of facilitating a national banking system by granting national banks 'most favored lender' status in their home states could be frustrated by unfriendly state legislation.").[3]

Moreover, since the language of Section 27 is almost identical to that contained in 12 U.S.C. § 85 (governing national banks), 12 U.S.C. § 1463(g) (governing federally-insured savings institutions), and 12 U.S.C. § 1785(g) (governing federally-insured credit unions), the interpretation of "interest" in Section 27 will affect all types of depository institutions in connection with all of their interstate and intrastate lending programs.

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[3] Congress conferred upon federally-insured state banks the same "most favored lender" status previously enjoyed by national banks when it borrowed the language used in Section 85 of the NBA in drafting Section 27 of the FDIA in 1980. *Greenwood Trust v. Massachusetts*, 971 F.2d at 826-827; *Hunter v. Greenwood Trust Co.*, 1995 N.J. LEXIS 1354 at *13-*14; *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 159; FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992).

CONCLUSION

For the reasons set forth above, Amici respectfully request the Court to grant the petition for a writ of certiorari in this case.

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No. 95-963

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,

Petitioner,

v.

JAMES HUNTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

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AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

This amici curiae brief is filed in support of Greenwood Trust Company by MasterCard International Incorporated ("MasterCard") and VISA U.S.A. Inc. ("VISA"). MasterCard and VISA (collectively, "Amici") agree with Petitioner that a writ of certiorari should be granted in *Hunter v. Greenwood Trust Co.*, No. A-103-94,

1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995) ("*Hunter*"). Petitioner and Respondent each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

VISA and MasterCard are associations of financial institutions that license service marks for use in connection with credit cards, debit cards, automated teller machines and related financial services. As of year-end 1994, VISA and MasterCard had approximately 17,000 and 13,600 depository institution members, respectively, that collectively have issued a credit card to most adults in the United States. *The Nilson Report*, Issue No. 591 (Mar. 1995) at 8.

Amici's members that are national banks are vitally interested in the proper interpretation of 12 U.S.C. § 85 ("Section 85"), which governs the interest that may be charged on loans made by national banks. Amici's members that are state-chartered banks, federally- or state-chartered savings associations, or federally- or state-chartered credit unions, also are particularly interested in the interpretation of Section 85 because most of these federally-insured depository institutions have authority under Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (1980), to charge the same interest that national banks are authorized to charge under Section 85. *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 830 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (Section 521) ("*Greenwood Trust*"); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (Section 522).

The discussion below focuses on the importance of this case for the credit card industry because *Hunter* deals

with credit card loans. However, Section 85 and Sections 521 through 523 of DIDA are not limited to credit card programs; they apply to all types of retail and commercial loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) (tax refund anticipation loans). Thus, the principle at issue in this case is critically important for virtually every lending function of the banking industry.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve an irreconcilable conflict between the New Jersey Supreme Court on the one hand, and the California and Colorado Supreme Courts and the United States Courts of Appeals for the First and Third Circuits on the other hand, on the important federal question of whether late fees are interest for purposes of Section 85 and Section 521 of DIDA. Immediate resolution of this issue is urgently needed to reestablish the uniform national rule that the federal government established for the national banking system, but that was not followed by the New Jersey Supreme Court.

Prompt review by this Court is imperative because uncertainty regarding the permissibility of late charges assessed with respect to billions of dollars of credit will adversely affect both the ability of borrowers to obtain credit and the national economy. Resolution of this issue also significantly affects the extraordinary liability plaintiffs seek to impose on of Amici's members that have collected late fees permitted by federal law, but not the law of the borrower's state.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT AND TWO OTHER STATE COURTS OF LAST RESORT AS WELL AS TWO FEDERAL COURTS OF APPEALS.

Review on a writ of certiorari is proper in this case because a state court of last resort has decided a federal question in a way that directly conflicts with the decisions of state courts of last resort in two other states and two federal Courts of Appeals. *See* Sup. Ct. R. 10(b).

Late fees charged by a national bank on credit card loans were held to be interest for purposes of Section 85 by the California Supreme Court in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for cert. filed*, 64 U.S.L.W. 3417 (U.S. Nov. 30, 1995) (No. 95-860) (*"Smiley"*), by the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) ("*Copeland*"), and *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) ("*Richardson*"), and by the United States Court of Appeals for the Third Circuit in *Spellman v. Meridian Bank*, No. 94-3203, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) ("*Spellman*").

Similarly, late fees assessed on credit card loans by a state-chartered bank were held to be interest for purposes of Section 521 of DIDA by the United States Court of Appeals for the First Circuit in *Greenwood Trust,* by the Colorado Supreme Court in *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) ("*Stoorman*"), and by the California Court of Appeal in *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted,* 889 P.2d 540, 38 Cal. Rptr. 2d 346, *review dismissed,* 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for cert. filed,* 64 U.S.L.W. 3438 (U.S. Dec. 18, 1995) (No. 95-951) ("*Harris*").

The *Smiley, Copeland, Richardson, Spellman, Greenwood Trust, Stoorman* and *Harris* decisions persuasively and correctly explain why both Section 85 and Section 521 of DIDA apply to late fees. Nonetheless, the New Jersey Supreme Court held in *Hunter,* and in *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for cert. filed,* 64 U.S.L.W. 3439 (U.S. Dec. 21, 1995) (No. 95-991) ("*Sherman*"), that late fees on credit card loans are not covered by Section 85 and Section 521 of DIDA because those statutes apply only to periodic percentage rate charges assessed on outstanding loan balances.

This conflict on the proper interpretation of Section 85 and Section 521 of DIDA is most acute in New Jersey. As a result of the Third Circuit's decision in *Spellman*, federal courts in New Jersey will recognize that late fees are interest under Section 85 and Section 521. However, state courts in New Jersey must follow the New Jersey Supreme Court's decisions in *Sherman* and *Hunter*, which are in direct conflict with *Spellman*.

Without resolution by this Court of the conflict on this critical issue, the scope of federal interest authority under Section 85 and Section 521 will vary depending on the state in which a bank's borrowers reside. Such a result would be inconsistent with the principle in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that Section 85 applies on the basis of the national bank's location and not the borrower's residence.

Not only does the New Jersey Supreme Court's interpretation of Section 85 and Section 521 of DIDA conflict with decisions from the California and Colorado Supreme Courts and the First and Third Circuits, it also conflicts with the interpretation of the federal agencies charged with interpreting these federal statutes. The Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation ("FDIC") have stated repeatedly that credit card late fees are covered by Section 85 and Section 521, respectively. *See, e.g.*, Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 (reaffirming and restating the OCC's long-time position); Letter from Douglas Jones, FDIC Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534.

In addition, as part of the OCC's general revisions to its interpretive rules, the OCC has proposed to codify its position that late fees are "interest." *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (Mar. 3, 1995). Nonetheless, the New Jersey Supreme Court refused to grant to the interpretations of the federal agencies the deference called for by this Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995), *Federal Deposit Insurance Corporation v. Philadelphia Gear Corp.*, 106 S. Ct. 1931.

The resolution by this Court of the central and fundamental federal question of whether Section 85 and Section 521 of DIDA apply to late fees is urgently needed now. There is no dispute that the late fees assessed by national and state banks in numerous pending lawsuits are permissible if Section 85 and Section 521 apply. A conclusive answer from this Court that late fees are interest thus will resolve those lawsuits, and avoid unnecessary, repetitive, costly, and disruptive additional litigation. Immediate resolution of the conflict on this issue also is essential to enable national and state banks to know what law applies to the late fees they charge on the billions of dollars of credit now being extended to borrowers, and to ensure that the national banking system functions effectively and efficiently.

II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE.

Financial institutions in the United States regularly extend enormous amounts of credit on credit card accounts. The outstanding balances on VISA and MasterCard credit cards issued in the United States alone exceeded $275 billion at mid-year 1995. *The Nilson Report,* Issue No. 603 (Sept. 1995) at 7. Amici's members which extend the hundreds of billions of dollars of credit must be able to determine whether late fees are included in the federal interest authority provided by Section 85 and Section 521, since late fees constitute a significant component of credit card pricing. Absent such guidance, banks cannot know whether their lending charges comply with applicable fee limitations. If they guess wrongly, they are exposed to tens, if not hundreds, of millions of dollars of liability for imposing excess fees.

The late fee itself is a very important price component of credit card loans. That fee facilitates the fair and efficient administration of credit card programs; it allows card issuers "to impose default costs on late payers, who are responsible for them, and to avoid shifting [such costs] to timely payers, who are not." *Smiley*, 11 Cal. 4th at 161. In addition, late fees constituted a majority of the estimated $2.1 billion in miscellaneous fees (namely, fees other than periodic finance charges, annual fees and cash advance fees) that were collected by bank card issuers in 1994. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

This issue already has generated a significant amount of complicated, time-consuming, and expensive litigation. Over forty-five class action lawsuits and state enforcement actions have been filed across the country since November

1991 challenging whether Section 85 or Section 521 applies to late fees on credit card loans. To date, such cases have been filed in Alabama, California, Colorado, Maine, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, and Wisconsin. In many instances, the plaintiffs' theories of state law violations could result in recoveries of a multiple of the allegedly excessive late fees, or even forfeiture of all charges (including periodic finance charges). Prompt resolution of the scope of Section 85 and Section 521 is thus needed to protect national banks and state banks from potentially ruinous damages under state law.

The current uncertainty also presents a clear risk of substantial disruption to the nation's credit card payment systems, which are critical to the functioning of the nation's economy. At mid-year 1995, there were approximately 343.1 million VISA and MasterCard credit cards issued domestically, which accessed about 252.9 million accounts. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Annualizing data for the first six months of 1995, there were approximately 5.5 billion transactions on VISA and MasterCard credit cards issued in the United States alone, for an aggregate volume of $490.5 billion. *Id.*

In reliance on existing case law and the interpretations of the OCC and FDIC, Amici's members have established pricing for their credit card accounts based upon the understanding that federal law controls the permissibility of late fees. If the courts do not follow the federal agencies' guidance on this point, the pricing structures of Amici's members will be at risk, leaving those institutions in a potentially precarious state which could threaten their existence. In addition, new interpretations of the applicable law that governs late fees will force Amici's members to engage in costly and time-consuming changes to existing account pricing strategies and systems for servicing their

credit card accounts. The uncertainty and resulting dislocation are likely to impact significantly the availability of credit on bank cards nationwide.

CONCLUSION

For the reasons set forth above, Amici strongly urge the Court to grant the petition for certiorari in this case.

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GREENWOOD TRUST COMPANY,

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Respondent.

On Petition For A Writ Of Certiorari
To The New Jersey Supreme Court

RESPONDENT'S MEMORANDUM OF NON-OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The sole question identified by petitioner does not adequately state the issues presented. If certiorari is granted, the Court should consider the following:

1. Did Congress intend Delaware's legislative definition of "interest" to define the federal term "interest" in section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d ("§ 521") (which amended section 27 of the Federal Deposit Insurance Act), and thereby displace other states' contract laws limiting the form or amount of contractual penalties for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to Delaware the power to define the federal lending term "interest" for all fifty states so as to preempt other states' contract laws?

3. As a matter of federal law, does "interest at the rate" in § 521 include contingent, sum-certain penalty charges (late fees), so as to preempt state limitations on the form or the amount of contractual penalties on revolving credit accounts?

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STATEMENT

James Hunter ("respondent" or "cardholder"), respectfully responds to, but does not oppose, the petition of Greenwood Trust Company ("Greenwood" or "the bank") for a writ of certiorari to review the opinion rendered in this action on November 28, 1995 by the New Jersey Supreme Court. In that opinion, New Jersey's high court correctly held that late fees are not "interest," that New Jersey law prohibiting banks from charging late fees does not conflict with either DIDA § 521 or section 85 of the National Bank Act ("NBA"), 12 U.S.C. § 85 ("§ 85"), and that DIDA does not preempt New Jersey's prohibition of late payment fees on credit cards. (Pet. App. 3a). Even though the result reached by the court below is correct in every respect, cardholder recognizes that this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition for certiorari, but wishes to point out certain misstatements made in the petition.

ARGUMENT

I. THE BANK HAS MISSTATED THE ISSUES THAT WARRANT REVIEW.

As correctly noted by the bank, the opinion below conflicts with recent decisions rendered by two state supreme courts and two federal courts of appeal in identical or virtually identical cases. The conflicting decisions fall into two different categories, but each turns on

whether state regulation of credit card late fees is preempted by federal regulation of the "interest" charged by banks for loans.

One of the conflicting decisions, like the case at bar, interprets, applies and determines the preemptive scope of § 521 of DIDA, the federal statute governing the "rate" of "interest" charged by federally insured state banks. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). The remaining decisions pertain to the statute on which § 521 was modeled, § 85 of the NBA, an almost identical statute that regulates the "interest" charged by national banks. *See Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 04, 15, 16, 17, 18, 1995 U.S. App. LEXIS 37194 (3d Cir. Dec. 29, 1995); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, No. 95-860, 1996 U.S. LEXIS 700, 64 U.S.L.W. 3500 (U.S. Jan. 19, 1996); *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995) (Pet. App. 18a-73a), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 1540, *review dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 87 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. 1995), *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995). Because §§ 521 and 85 mirror each other, the issues raised by the two categories of cases interpreting them are the same.

In *Smiley*, a § 85 case, this Court granted certiorari on the three issues set forth above as the "Questions Presented." Here, the bank maintains that this case and *Smiley* conflict on virtually the same matters, yet it seeks review of only one issue – whether "interest" includes late fees. As this Court apparently recognized in granting review in *Smiley*, the other issues raised by these cases – whether Congress intended for one state's definition of "interest" to define the federal term for all fifty states and thereby displace other states' contract laws, and whether Congress can constitutionally delegate such power to a single state[1] – are significant and worthy of the Court's consideration. Accordingly, if the Court grants certiorari here, respondent respectfully submits that it should do so on the same three issues that have been accepted for review in *Smiley*.

II. THE BANK HAS MISSTATED THE EXISTENCE OF AND SIGNIFICANCE OF OTHER CONFLICTS.

In its reasons for granting certiorari, Greenwood argues that the decision below conflicts with the opinions of federal banking agencies. However, the agency views referenced by the bank are not entitled to deference because, among other things, (i) the agencies have been

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[1] These other two issues arise because, if the bank's interpretation of "interest" in § 521 is correct, and the New Jersey Supreme Court's interpretation is wrong, then that necessarily would mean that Delaware law must provide the definition of the federal term. If that is the case, then Delaware would be defining federal lending terms for the entire nation.

inconsistent on these matters;[2] (ii) §§ 85 and 521 do not delegate interpretative authority to the agencies;[3] (iii) a

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[2] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 466 n. 30 (1987) (an agency's interpretation which conflicts with its earlier interpretation is "entitled to considerably less deference" than a consistently held view). For example, in this case and others pending around the country, the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") initially maintained that the federal statutory term "interest" must be defined pursuant to state law. More recently, both agencies have changed their view, and have conceded that federal law must define the term. In fact, the OCC has taken at least eight inconsistent positions with respect to the term "interest." *E.g.*, compare June 25, 1964 letter written by Comptroller James J. Saxon (concluding that late fees are not interest) with OCC Interpretive Letter No. 670 [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995) (opining otherwise). This inconsistency is aggravated by Congressional and other agency statements establishing that late fees and other loan penalties are not "interest" under the federal banking laws. For example, in 1980, relying on the legislative history of DIDA, S. Rep. No. 368, 96th Cong., 1st Sess. 19 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 255, the only federal banking regulator with any delegated authority to interpret the interest rate statutes, the Federal Home Loan Bank Board ("FHLBB"), adopted a federal regulation stating:

> Nothing in this section [501 of DIDA] preempts limitations in state laws on prepayment charges, attorneys' fees, *late charges* or other provisions designed to protect borrowers.

12 C.F.R. § 590.3(b) (1980) (emphasis added). That regulation, which should apply to all the interest rate sections of the same Act, practically quotes DIDA's legislative history verbatim. *See* 1980 U.S.C.C.A.N. at 255.

[3] When Congress delegates interpretative authority to the bank regulators, it does so expressly. Section 84(d) of the National Bank Act, for example, includes such a delegation. 12

court may defer to an agency opinion only when a federal statute is "silent" or "ambiguous," but when a statute is silent or ambiguous with respect to preemption, the presumption against preemption should preclude a finding of preemption;[4] (iv) the agency letters were written by staff attorneys, not by the agency heads;[5] (v) many of the opinions are ad hoc and were arrived at in connection with the current litigation solely to rationalize the result the agencies already had reached;[6] and (vi) the opinions

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U.S.C. § 84(d). In contrast, neither § 521 nor § 85 confers any interpretative powers on the FDIC or the OCC. In the absence of such delegation, the agencies' interpretations cannot be given any deference.

[4] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter"); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").

[5] The OCC has represented to this Court that informal letters by staff members are not binding, are not reliable and do not constitute final agency action. *See* Brief for the Federal Petitioners filed in *Nationsbank, N.A. v. Variable Annuity Life Insurance Co.*, Nos. 93-1612, 93-1613, brief at 38, n. 19 (U.S. filed July 29, 1994). The only opinions by the agency heads in this case are those of Comptroller Saxon, concluding that late fees are not "interest," and the FHLBB, concluding that DIDA does not preempt state limitations on late fees. *See supra* note 2.

[6] *See Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442-43 (7th Cir. 1994) (en banc) (refusing to defer to administrative construction developed only after litigation was commenced), *aff'd*, 133 L. Ed. 2d 535 (U.S. 1996); *Martin v. Refrigeration School, Inc.*, 968 F.2d 3, 7-8 (9th Cir. 1992) (same).

lack a sustainable rationale.[7] Because the agencies are not entitled to deference, the fact that the decision below conflicts with their views is not an appropriate basis for granting certiorari.

The bank also argues that certiorari should be granted because the lower court's opinion purportedly conflicts with decades of jurisprudence, including decisions by this Court, as well as banking practices in 1864. However, prior to the 1992 decision in *Greenwood Trust*, 971 F.2d at 818, no court ever held that contingent sum-certain late fees are "interest." Moreover, when Congress enacted the NBA in 1864, this Court had already instructed on at least three occasions that "interest" did not include contract penalties such as late fees.

In *Tayloe v. Sandiford*, 20 U.S. (7 Wheat.) 13, 17 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . " Similarly, in *Lloyd v. Scott*, 29 U.S. (4 Pet.) 205 (1830), the Court held:

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[7] The opinions lack a sustainable rationale because, among other things, they ignore the many cases holding that single-sum contingent penalties are not interest and are illegal. *See, e.g., Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942) (the distinction that a "penalty is a fixed ad valorem amount taking no account of time, and interest which does depend on time, is persuasive"); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced"); *United States v. Childs*, 266 U.S. 304, 307 (1924) (a penalty is a means of punishment while interest is a means of compensation); *New Orleans, Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (special charges in excess of time-based interest are not allowed).

> If a party agree [sic] to pay a specific sum exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

Id. at 226 (emphasis added). Likewise, just one year before enactment of the NBA, the Court stated with respect to any contingent charge:

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863). Thus, contingent sum-certain charges like credit card late fees, attorney fees, return check fees and overlimit fees, because they are neither based on the unpaid balance nor measured by time, were not considered "interest" when the NBA was passed. Rather than contradicting this jurisprudence and lending practice dating back to the early 1800s, the lower court's decision here is completely consistent with this Court's longstanding differentiation between compensatory "interest" and punitive or deterrent contract penalties.

The bank further contends, incorrectly, that the lower court's analysis is inconsistent with the most favored lender doctrine and with *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). *Marquette* held only that a national bank may export its home state's *rate* of interest. Since Delaware's definition of the components of interest has nothing to do with the *rate* at which interest is allowed, *Marquette* provides no basis for

exporting Delaware's definition of "interest." The bank may still charge the unlimited rates allowed by its home state when it solicits New Jersey consumers. It may not, however, impose a separate, sum-certain penalty fee which is neither a time-based *"rate"* nor "interest." Because New Jersey law does not limit the amount of the bank's "interest rates," but only the form and amount of its contract penalties, it does not conflict with § 521.

Nor is the New Jersey decision in conflict with the most favored lender doctrine announced by this Court in *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874). That doctrine permits a national bank to charge the highest statutory "interest rate" available to any lender within the bank's home state. Even assuming the doctrine applies to state-chartered banks, the decision below clearly leaves all lenders in New Jersey on at least equal footing. Under the lower court's interpretation, when any Delaware lender solicits business in New Jersey, that lender, like every other company soliciting business in the state, is bound by New Jersey's contract and consumer protection laws regulating sum-certain penalties. Similarly, when making intrastate loans, all the banks remain at least on equal footing because they can charge both the same interest and the same late fees. Furthermore, if any Delaware lender is ever entitled to charge a higher interest rate than other lenders in the state, Greenwood, by virtue of its most favored lender status, would also be entitled to charge that higher *rate*. Thus, contrary to the bank's assertion, the lower court's decision below leaves the most favored lender doctrine completely intact.

In summary, though the decision below is contrary to recent decisions rendered by other state supreme courts and federal courts of appeals in identical or virtually identical cases, the other so-called "conflicts" identified by the bank either do not exist or do not matter. In light of *Tayloe, Lloyd, Spain, Marquette* and *Tiffany,* the New Jersey Supreme Court's decision does not contradict this Court's pronouncements. The fact that the decision conflicts with the current, inconsistent and unauthorized views of the banking agencies is immaterial since those views are not afforded any deference anyway. Thus, the *only* possible basis for granting certiorari here is the conflict among the states and federal courts of appeals as described in part I of this memorandum.

CONCLUSION

Even though the lower court's decision is correct in every respect, cardholder recognizes that, given the conflict among the state supreme courts and federal courts of appeals in these matters, this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition, but respectfully submits that if the Court grants certiorari here, it should do so on the same three issues as are now before the Court in *Smiley*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner Greenwood Trust Company ("Greenwood") submits this Reply Brief in support of its petition for a writ of certiorari.

Respondent James Hunter has filed a brief in which he states that he does not oppose Greenwood's petition, since he "recognizes that this case satisfies the Court's criteria for granting certiorari." (Respondent's Brief at pp. 1, 10). Indeed, as noted in respondent's brief, subsequent to the filing of Greenwood's petition, this Court granted certiorari in a case against a national bank involving the issue of whether credit card late charges are "interest" within the meaning of Section

85 of the National Bank Act, 12 U.S.C. §85. *Smiley v. Citibank (South Dakota), N.A.*, No. 95-860, 1996 U.S. LEXIS 700, 64 U.S.L.W. 3500 (Jan. 19, 1996).

This case involves Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d, which governs federally-insured state banks such as Greenwood. Just as the courts below have reached conflicting conclusions in national bank cases concerning whether late charges are "interest" under Section 85 of the National Bank Act, so too have the courts differed in their interpretations of Section 27 of the Federal Deposit Insurance Act. While the New Jersey Supreme Court held in this case that late charges are not "interest" under Section 27 of the Federal Deposit Insurance Act, in other cases brought against Greenwood the First Circuit Court of Appeals and Colorado Supreme Court held that late charges *are* "interest" for purposes of Section 27. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 974 (1993); *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995).

Greenwood submits that Section 27 of the Federal Deposit Insurance Act should be construed *in pari materia* with Section 85 of the National Bank Act, since Congress incorporated into Section 27 the language used previously in Section 85 in order to create parity between federally-insured state banks and national banks. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d at 826-827. However, in the courts below the plaintiffs have attempted to draw distinctions between Section 27 and Section 85 based on: (a) the slight differences in language between the two statutes;[1] and (b) the fact that Section 27 originated as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), and the legislative history of Section 501 of

1. Section 27 of the Federal Deposit Insurance Act has a clause that expressly preempts State constitutions and statutes, whereas Section 85 of the National Bank Act does not contain an express preemption clause. Plaintiffs have argued that common law challenges to late charges are outside the scope of Section 27's express preemption clause.

DIDA (codified as 12 U.S.C. §1735f-7a(a)(1)) shows that Congress did not intend the preemptive sweep of Section 501 to extend to late charges.

Although Greenwood does not believe that the plaintiffs' efforts to differentiate between Section 27 of the Federal Deposit Insurance Act and Section 85 of the National Bank Act have any validity, nonetheless it is concerned that even if this Court were to affirm the California Supreme Court's holding in *Smiley v. Citibank* that late charges are "interest" under Section 85, plaintiffs will seek to avoid that ruling in Section 27 cases by making the arguments discussed above. Thus, unless certiorari is granted in a Section 27 case to resolve the conflicts that now exist, there will undoubtedly be further uncertainty and litigation involving federally-insured state banks.

Counsel for Greenwood is cognizant of the expedited briefing schedule established by this Court in *Smiley v. Citibank*. Since Greenwood believes that this case should be briefed and argued at the same time as the *Smiley* case, if certiorari is granted in this case it will be prepared to submit its brief on the merits at the same time that Petitioner's brief in *Smiley* is due, namely, March 1, 1996.

Accordingly, Greenwood respectfully submits that its petition for a writ of certiorari should be granted to resolve the conflict in the courts below concerning Section 27 of the Federal Deposit Insurance Act.

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